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**DAR Case 90-438, Rights in Technical Data
55 FR 41788 (October 15, 1990)**

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December 14, 1990

Linda W. Neilson
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c/o OUSD(A)(M&RS)
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RE: Data Rights of Contractors with the Government

Dear Ms. Neilson:

This letter is in response to an invitation for public comment on the subject, Federal Acquisition Regulations; Rights in Technical Data as appeared in Vol. 55, No. 199 of the Federal Register dated October 15, 1990 at page 41788.

The Section of Patent, Trademark and Copyright Law of the American Bar Association has over the last two years studied the development of technical data legislation and implementing procurement regulations of the various governmental agencies. From this study, the Section has become concerned with the potentially adverse impact of the October 1988 DoD Interim Regulation (and the subsequent draft regulation published October 15th) on the maintenance of a strong technology base in U.S. companies. The Section is specifically concerned with the protection of data rights of contractors with the government.

In response to this concern, the Section has identified six areas where the regulation can be improved. These views are being presented only on behalf of the Section of Patent, Trademark and Copyright Law. They have not been submitted to nor approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the ABA. These six areas identify the need to:

1. Distinguish between ownership of documents and ownership of information embodied in the documents;
2. Protect information created in whole or in part with contractor funds;
3. Eliminate the requirement that protectable information first related to "developed" items;

Linda W. Neilson
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4. Limit the acquisition of documents embodying information created with contractor funds;
5. Allow contractors to place proprietary legends on documents embodying information created with contractor funds; and
6. Limit record-keeping requirements for supporting notifications, listings, justifications and representations to proprietary information created subsequent to the effective date of the regulations

As a consequence, the Section has adopted six resolutions concerning data rights of contractors with the Government. The resolutions are summarized in the attached memorandum and are respectfully submitted for your consideration in developing new legislation and/or regulations consistent with the protection of proprietary rights in this area.

Respectfully,

Thomas F. Smegal Jr

Thomas F. Smegal, Jr.
Chair

TFS:mab

Enclosure

cc: PTC Officers

Robert C. Walker, Esquire

MEMORANDUM

DATA RIGHTS OF CONTRACTORS WITH THE GOVERNMENT

BACKGROUND

In October, 1984, Congress enacted the Defense Procurement Reform Act of 1984 (P.L. 98-525) and the Small Business and Federal Procurement Competition Enhancement Act of 1984 (P.L. 98-577). The two Acts mandated a reworking of the data rights regulations of both the civilian agencies and the Department of Defense. The objective of the legislation was to achieve a balance between the Government's need for data and the rights of its contractors in technical data.

The Civilian Agencies

Proposed regulations of the civilian agencies were published for public comment in 1985 and were finalized with an effective date of June 1, 1987. 50 Fed. Reg. 32,870 (August 15, 1985) and 52 Fed. Reg. 18,140 (May 13, 1987), respectively. The regulations now appear in the Federal Acquisition Regulation (FAR) at Subparts 27 and 52.

The civilian regulations "recognize that its contractors may have a legitimate proprietary interest...in data resulting from private investment," and that agencies must "strike a balance between the Government's need [for data] and the contractor's legitimate proprietary interest." FAR Paragraph 27.402(b). Under the civilian regulation, data developed at private expense, if specified for delivery under contract, may be withheld from delivery. FAR Paragraph 52.227-14(g)(1). If the Government ultimately determines that delivery of the data is needed, the data becomes deliverable under a protective "Limited Rights Notice" (for technical data) or under a protective "Restricted Rights Notice" (for computer software). FAR Paragraph 52.227-14 (Alternate II and Alternate III).

The Department of Defense

The Department of Defense (DoD) published its first draft regulation in September 1985. 50 Fed. Reg. 36,887 (September 10, 1985). That regulation was widely criticized as failing to strike the "balance" that Congress had intended. DoD withdrew the regulation and issued an interim regulation with controversial definitions of "developed" and "private expense" deleted, but otherwise retaining many of the provisions of the originally proposed regulation. 50 Fed. Reg. 43,158 (October 24, 1985).

The DoD statute was subsequently amended by the National Defense Authorization Act of Fiscal Year 1987 (P.L. 99-661) with direction to define "developed" and "private expense" and with commentary in the conference report as to how the "balance" should be struck in resolving data rights issues.

DoD published final regulations in April 1987 implementing P.L. 98-525 as amended by P.L. 99-661. 52 Fed. Reg. 12,390 (April 16, 1987). Again, the April 1987 regulation was considered by many as seriously overreaching with respect to the treatment of data 1) resulting from indirect expenditures, and 2) resulting from mixed funding situations, and had other problem areas.

Congress made another attempt in the National Defense Authorization Act for Fiscal Years 1988 and 1989 (P.L. 100-180) to clarify its direction as to the interest of the Government and the rights of contractors in technical data.

In response, the DoD published a completely rewritten regulation in April 1988, and implemented the provisions as an interim regulation. 53 Fed. Reg. 10,780 (April 1, 1988). The interim regulation included significant new material and required extensive new record-keeping and paperwork. The "balancing" of interests under the regulation and the paperwork burden were again severely criticized. On September 26, 1988, the Office of Management and Budget (OMB) advised DoD that the interim regulation had been published without the clearance required by the Paperwork Reduction Act and was not, therefore, enforceable to the extent that new record-keeping and paperwork was required.

In October 1988, the DoD issued a second interim regulation. 53 Fed. Reg. 43,698 (October 28, 1988). The second interim regulation is a substantial improvement over the first. However, the implementation of the policies stated in the second interim regulation is seriously deficient in that the technical data clause unwarrantedly limits what can be protected as private expense technical data in DoD contracts and still imposes burdensome paperwork requirements for supporting claims of private expense data. The paperwork requirements have the potential of making it impossible for many contractors to take advantage of rights reserved to them under the regulation--procedurally depriving contractors of substantive rights guaranteed by the statutes.

RESOLUTIONS

1. Distinguish between ownership of documents and ownership of information embodied in the documents.

RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principle the enactment of

legislation and the establishment of federal procurement regulations which distinguish between the ownership of technical documents delivered under a contract and the ownership of proprietary rights in technical information embodied within the documents.

Federal statutes such as 10 USC 2320, the Federal Acquisition Regulation (FAR), and Department of Defense Supplement to the FAR (DFAR) all utilize a generic term "technical data" to refer to both the documents delivered under a contract and to the information embodied within the documents. The use of the generic term obfuscates the distinction between ownership of the documents (i.e. the paper prepared and delivered to the Government) and ownership of proprietary rights in the information embodied in the documents. For example, in the October 28, 1988 DFAR Interim Technical Data Regulation the term "technical data" appears in substantive usage on the order of 226 times; 85 times with a nuance as documents and 141 times with a nuance as information embodied in the documents. Sometimes it is difficult to tell whether it is the documents or the information that is being addressed. The ability to distinguish between the two is important; ownership of the documents and ownership of the information frequently rest in different parties.

Simplistically, when "technical data" is developed with Government funds, 1) it may mean that the papers (technical documents) are prepared with Government funds; or, 2) it may mean that intellectual property (technical information) is created with Government funds. When "technical data" is developed at private expense, 1) it may mean the papers are prepared at private expense; or, 2) it may mean that intellectual property is created at private expense. The ultimate confusion occurs when papers that are prepared and delivered with Government funds embody intellectual property created at private expense. The confusion cannot adequately be resolved in legislation or in a regulation using the single "technical data" term to cover both the papers and the intellectual property embodied in the papers.

Procurement regulations, in no uncertain terms, ought to preserve to a contractor who creates intellectual property at its own expense, the right to own full proprietary rights in that property. Funding for the preparation and delivery of documents embodying that information should not affect proprietary rights in the information. The current confusion can be avoided and relevant problems addressed by splitting the term "technical data" into the two constituents --- a) documents, and b) the information embodied in the documents.

Current federal statutes, the FAR, and the DFAR are in need of correction on this point.

2. Protect information created in whole or in part with contractor funds.

RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principle the enactment of legislation and the establishment of federal acquisition regulations fully protective of contractor's proprietary rights in technical information created in whole or in part with contractor funds.

The Section concern is that the DoD interim regulation dated October 28, 1988 appears to be directed to implementing procurement policy rather than to resolving legitimate rights in intellectual property. In an apparent effort to avoid possibilities of contractor abuse in the procurement process, the DoD has structured an overreaching regulation which prevents contractors from retaining substantial information created at private expense.

For example, the broad definition of "Government Funds" in the interim regulation sweeps in private expense information necessary to perform government contracts. In these instances the Government not only gets the benefits of private expense technology in the form of superior products, but receives recompense rights in the contractor's proprietary information as well.

The Section believes the avoidance of all potential contract regulations which preserve contractor's sole proprietary rights in technical information created with contractor or abuse does not justify Government abuse through confiscatory policies which deprive nonabusing contractors of their legitimate rights and/or discourage the use of privately created information in the performance of Government contracts. Procurement requirements ought to be solved through royalty-bearing licensing or other available alternatives, not through confiscation of private rights. The tenor of the statutes seem clear on this point. See 10 USC 2320.

The regulations of the civilian agencies seem to be more on target. The policy statements set forth in FAR Paragraph 27.402 and 27.404, as implemented in the data rights clause at FAR 52.227-14 (including Alternate I), recognize that private information "trade secrets ... commercial or financial and confidential or privileged" is entitled to protection.

3. Eliminate the requirement that protectable information first relate to "developed" items.

RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principle the enactment of legislation and the establishment of federal acquisition

regulations which preserve contractor's sole proprietary rights in technical information created with contractor funds, irrespective of whether the technical information is used for the design or manufacture, or otherwise relates to an item, component or process subsequently developed with Government funds.

This resolution differs from Resolution No. 2 in that it specifically addresses one deficiency in the October 28, 1988 DFAR Interim Regulation and one conflict within both 10 USC 2320 and the DFAR Interim Regulation.

With respect to the deficiency in the Regulation, there is no provision for protecting contractor proprietary information that does not pertain to "developed" items or processes. 10 USC 2320 (a)(2)(B) explicitly protects contractor technical data "pertaining to items and processes developed exclusively at private expense"; it does not, however, limit protection exclusively to such technical data. Section 2320(a)(1) explicitly recognizes that there are other contractor rights in technical data which are to be protected. For these reasons, the words in the Regulation which restrict "limited rights" status to instances where technical data pertains to "developed" items, components, or processes preempt protection of valuable contractor information, are overreaching and ought to be deleted.

With respect of the conflict in both 10 USC 2320 and the DFAR Interim Regulation, the Government is to obtain "unlimited rights" in technical data pertaining to items, components, or processes developed with Government Funds and is to obtain "limited rights" in technical data pertaining to items, components, or processes developed at private expense. The inconsistency is, of course, that the same technical data may meet both requirements --- this is the nature of intellectual property. Technical documents prepared to support Government funded items and technical documents prepared to support private expense items are likely to embody the same technical information.

The FAR regulation of the civilian agencies is drafted in a manner such as seems to avoid this conflict. In the FAR there is an inherent recognition that it is "information" of the creator that is to be protected, notwithstanding the fact that the information may later appear in documents pertaining to items, components, or processes developed with Government funds. Through FAR Paragraph 52.227-14 (Alternate I) a contractor is entitled to protect his property rights.

Statutory and regulatory language which base the allocation of technical data rights on the developmental status of items and processes, instead of the creator of the intellectual property from which the items or processes were developed is not consistent with sound intellectual property law principles and ought to be amended.

4. Limit the acquisition of documents embodying information created with contractor funds.

RESOLVED, that the Section of Patent, Trademark and Copyright Law favors in principles the enactment of legislation and the establishment of federal acquisition regulations which limit the acquisition by the Government of technical documents or computer software embodying technical information created with contractor funds to cases where 1) the Government has identified a specific need for such documents or computer software, and 2) the need cannot be met through other means, such as direct licensing, or procurement under form, fit, and function or performance specifications.

The civilian regulation at FAR Paragraph 52.227-14(g) authorizes the substitution of form, fit, and function data for documents otherwise required to be delivered under contract, but which contain contractor "trade secrets ... commercial or financial and confidential or privileged" information. Following a specific request by the Contracting Officer for the withheld information, the information is to be delivered with a "Limited Rights Notice".

There do not seem to be similar withholding provisions in the October 28th, DoD interim regulation.

5. Allow contractors to place proprietary legends on documents embodying information created with contractor funds.

RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle any federal acquisition regulations which prevent contractors from affixing proprietary rights notices to documents embodying technical information created in whole or in part with contractor funds, and which, without the authorization of the contractor, permit the Government to remove proprietary rights notices from such documents.

This resolution is related to Resolution No. 3. No legend under the October 28, 1988 DFAR Interim Regulation is authorized for technical information created at private expense, but not yet pertaining to a "developed" item, component or process. Any proprietary legend on such privately created information may apparently be removed, to the effect that the privately created information becomes subject to "unlimited rights" in the Government.

Procedurally depriving contractors of proprietary rights in information created at private expense is contrary to sound intellectual property law practices and appears to be prohibited by 10 USC 2320 (a)(1).

6. Limit record keeping requirements for supporting notifications, listings, justifications, and representation to proprietary information created subsequent to the effective date of the regulations.

RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle any federal procurement regulations which require evidentiary records for supporting contractor notifications, listings, justifications and representations, or the like, in respect of proprietary technical information created prior to the effective date of the regulation.

The October 28, 1988 DFAR Interim Regulation requires notifications, listings, justifications, and representations with respect to proprietary technical information created prior to the effective date of the Regulation. Records or systems of record keeping may or may not currently be in place to enable contractors to protect rights in proprietary information. If not in place, such records would be extraordinarily expensive to retroactively construct. In many cases it may be impossible to do so with the reliability that would be needed under the regulation to make the required notifications, listings, justifications, and representations.

10 USC 2320(a)(2)(F)(i) precludes the Department of Defense from requiring a contractor to relinquish rights in technical data as a condition for the award of a contract. Ex post facto record keeping requirements have the potential of doing procedurally what the statute substantively prohibits.

From: Miss ~~Freda~~ Sedgwick, ADE/IPR



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Your reference **FAR/DAR Case 90-438**

Our reference **Pats/L/93**

Date **30 January 1991**

Dear Linda

FAR/DAR CASE 90-438

We have already spoken in re the ANPR on FAR technical data rights provisions and you are expecting an input from me.

I am now submitting the comments and proposed revisions attached hereto (Annexes A and B). Please contact me if you have any questions or would you like some further input.

Yours sincerely

PP- **F SEDGWICK**
ADE/IPR

Annexes:

- A. Comments on FAR/DAR Case 90-438.
- B. Synopsis of Proposals in re FAR/DAR Case 90-438.

REFERENCE DOCUMENTS

- A. Document AC/259-D/700 (Final)
AC/94-D/283 (Final)
NIAG (79)D/1 (Final)
- B. DoD 5105.38-M, para 140108 E2
- C. Master Information Exchange Arrangement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland for Defence Purposes dated September 1988
- D. The Technical Cooperation Programme (US, UK, Canada, Australia, New Zealand), operating under the POPNAMRAD (Policies, Organisation and Procedures in Non-Atomic Military Research and Development), dating from 1950s/1960s.
- E. The ABCA Standardisation Programme (US, UK, Canada, Australia, New Zealand) dating from 1947
- F. The NATO Agreement on the Communication of Technical Information for Defence Purposes, 19 October 1970
- G. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America to facilitate the Interchange of Patents and Technical Information for Defence Purposes dated 19 January 1953.

BACKGROUND AND GENERAL COMMENTS

- 1. The US DOD and the UK MOD have a long history of cooperation on defence programmes. Some of these are bilateral collaborations. Others involve additional countries both inside and outside NATO. It would be our wish to see such cooperation continue.
- 2. It is standard practice to have an arrangement such as a Memorandum of Understanding (MOU) tailored to suit the objectives of each case. In order to achieve the objectives of such arrangements it is essential that the data rights provisions which DOD and MOD use in their contracts should be sufficiently flexible to enable them to comply with collaborative requirements.
- 3. NATO has already recognised this need in its statement of policy at Reference A. This statement arose from the work of the NATO Intellectual Property Group (AC94) representing Government interests and the NATO Industrial Advisory Group representing Industry's interests.

SPECIFIC COMMENTS ON THE ANPR

- 4. Government Purpose Rights (GPR)
 - a. The ANPR encourages wider use of GPR than the current (interim) October 1988 DFARS. Contracts which might previously have given rise to Unlimited Rights will now attract GPR. Unlimited Rights clearly allow the US Government to pass technical data and software to a foreign Government or its industry for use in a collaborative programme.

b. We understand from Reference B and from your oral answer to our question at the first public hearing that GPR is also intended to be sufficiently broad to allow the Government to pass data to another Government or its industry. However, to comply with para 27.404-4(a) of the ANPR it seems that any such disclosure will have to be severely restricted to preserve the contractor's exclusive commercial rights. This would either severely impede the US Government's freedom to collaborate flexibly with other governments, or render it impossible for the USG to comply with undertakings that it gives in MOUs. So far as we are aware there has not, however, been any change of policy within DOD on availability of information to support collaboration.

c. We note that, in general, where the FAR addresses rights which are less than Unlimited Rights and such rights include foreign disclosure rights, these are specifically mentioned in the FAR language. Examples are at FAR 52.227-11 Alternates I and II, FAR 52.227-12 Alternates I and II and DFARS 252.227-7013(a)(15)(i)(B).

d. To make it quite clear that the Government has the rights needed, we would, therefore, suggest that the definition of GPR is amended as in Annex B to reflect rights to support collaboration.

e. All ranges of collaboration are intended to be covered from simple information exchanges to shared development and production programmes.

f. A possible alternative to the above to ensure maximum flexibility in providing for international collaboration would be to have a system which permits the Government to secure Unlimited Rights whenever there is an international requirement. In order to cater for contracts which have already been agreed with less than Unlimited Rights by the time the international requirement arises, such a system might allow GPR to automatically revert to Unlimited Rights not only after the passage of a period of time (as in the current ANPR), but also after instigation of an internationally collaborative programme.

5. Rights Under Copyright

a. It is appreciated that coverage of copyright in previous Rules has led to confusion by attempting to mosaic a user right for Government purposes with Unlimited Rights, Limited Rights and Restricted Rights.

b. We also note that internationally collaborative programmes can involve the US Government contracting on behalf of other Governments and with non-US contractors. The foreign Governments consequently rely upon the US' data rights conditions to secure their own user rights.

c. We accordingly have the following comments on the ANPR provisions dealing with copyright rights:

(1) the license provided to the Government covers a list of activities (reproduction, preparing derivative works, distributing copies to the public, performing publicly and displaying publicly). There appears to be an assumption that this is a comprehensive list of activities circumscribed by copyright. Is this a valid assumption to make in respect of all foreign copyrights?

(2) the copyright rights are granted to the Government and others acting on its behalf. If, for example, another Government were to be given user rights in technical data attracting Unlimited Rights, that Government could be using the information on its own behalf in some instances. The copyright licence, arguably, would not be sufficiently broad to cover the other Government's use.

(3) The copyright licence currently provided for in the ANPR has a specific scope which does not provide rights analagous to those secured in technical data and computer software. Bearing in mind that the scope of the data and software rights can vary from Unlimited to Restricted, how will the copyright rights dove-tail with these to provide a consistent overall package?

(4) the use of the word "or" in the phrase "paid-up, non-exclusive, irrevocable or worldwide license ..." is a clear misprint.

d. Bearing the above comments in mind, an alternative form of words is suggested at Annex B.

6. Standard Non-Disclosure Agreements

a. The current ANPR does not appear to require the conclusion of a (standard) non-disclosure agreement as a precondition to the receipt of GPR data by a third party.

b. US Industry, on the other hand, appear to be in favour of a compulsory agreement.

c. The UK MOD and the US DoD are involved in a number of ongoing bilateral and multilateral collaborative information exchanges (see, for example, References C-E) which assume that information is to be passed Government-to-Government without the need for a direct agreement between an originating contractor and the recipient Government.

d. In order to give defence contractors assurances that their information will be protected by recipients in Government-to-Government exchanges, the NATO Governments have concluded the Agreement at Reference F. This obliges recipient

Governments to respect caveats attached to information and contains provisions covering compensation payable to aggrieved contractors for unauthorised use. The UK MOD and US DoD also have a bilateral arrangement which addresses the same issues at Reference G.

e. Furthermore, when an internationally collaborative defence programme is established, its accompanying MOU should specify the constraints on use of information and will usually assume that agreements such as the ANPR's standard non-disclosure agreement are not necessary.

f. If there is to be a US requirement for mandatory use of non-disclosure agreements between a third party Government and an originating contractor the UK may need to reciprocate by introducing an equivalent requirement. We would support the Government in its efforts to introduce a FAR which does not require mandatory use as this allows for flexibility.

SYNOPSIS OF PROPOSALS IN RE FAR/DAR CASE 90-438

1. Government Purpose Rights. Add the following to the end of the first sentence in the definition of Government Purpose Rights in para 52.227-14(a):

" ... and including the ability to extend such rights to another Government or a party acting on their behalf to the extent required by any existing or future cooperative arrangement."

2. Copyright Rights. The following is offered as an example of possible wording to take account of the issues raised in Annex A and to substitute for the wording in the final two sentences of Clause 52.227-14(c)(1):

"The Contractor grants to the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, worldwide license together with the right to sublicense others to perform the acts which would otherwise be restricted by the Contractor's copyright sufficient to allow the exercising of the rights acquired under paragraph 'b.' above."

Similar wording would apply where copyright is addressed in clauses other than 52.227-14 (c)(1).

3. Non-Disclosure Agreements. Maintain an approach which would allow disclosures in support of international collaboration to take place without obligation to sign a non-disclosure agreements.

C

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January 29, 1991

VIA FACSIMILE

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RE: FAR/DAR Case 90-438

Dear Ms. Neilson:

In response to the advanced notice of proposed rule making published in the Federal Register of Monday, October 15, 1990, the California Institute of Technology submits the following comments for consideration with respect to the establishment of a rule on technical data for use by all Government agencies.

California Institute of Technology (Caltech) is a small, independent university that carries on instruction and research in science and engineering. The substantial majority of its research activities are supported by the United States Government. In addition to activities carried out at its campus, Caltech operates the Jet Propulsion Laboratory (JPL) for the National Aeronautics and Space Administration (NASA) as a Federally Funded Research and Development Center performing research and development in the national interest including, but not limited to, its role as NASA's lead center for unmanned exploration of the solar system and direction of unmanned planetary missions for the United States. Taken as a whole, the proposed revisions are viewed favorably and have the potential of facilitating Caltech's dealings with its subcontractors which, in fiscal year 1989, received awards in excess of fifty percent of Caltech's research funding. Therefore, as an entity which carries on substantial research and development activity on its own, and which also is engaged in substantial subcontracting activity according to operative Government procurement regulations, the following comments are submitted for consideration in connection with the proposed rule making.

A. Modification of Definition of Limited Rights Data

References: 27.401
27.404-2
52.227-14

The advanced notice of proposed rule making requested comments on the manner in which data rights for commercial products should be treated. Consideration should be given to addition of the clause at III B.4, Rights to Technical Data Pertaining to Modifications to Commercial Products for Government Use, to the definition of "Limited Rights Data". The reason is that this definition states that items, components, and processes "developed exclusively at private expense," are subject to limited rights to the Government. As the phrase "developed exclusively at private expense" is defined, no portion of the cost of development can be charged to the Government. This is potentially misleading with regard to Government funded minor modifications of commercial products. It is consistent with the Government's intention to treat these minor modifications with the same rights in data as pertaining to the product modified -- not with unlimited rights. Therefore, the subparagraph titled, "Rights to Technical Data Pertaining to Modifications to Commercial Products for Government Use," should be added to the clause.

B. Copyright Clause, Alternate IV

References: 27.404-5(c)(2)
27.410(e),(f)
52.227-14(c)

The prescription as to mandatory use of Alternate IV for basic or applied research to be performed solely by universities and colleges is to lauded, but should be extended to Federally Funded Research and Development Centers. Only when the specific purpose of a contract is to develop data, such as computer software, intended for distribution to the public, should an exclusion of the type discussed in 27.404-5(c)(2) be considered. Data or software generated incidentally to the purpose of the contract should not be excluded from Alternate IV.

C. Restrictions on Release, Distribution and Publication of Software

References: 27.404-6(b),(d)
27.405-2(b)(2)
27-406
52.227-17

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January 29, 1991
Page 3

In view of the solicitation of comments with respect to the entire rule, it is noted that paragraph (d) of 27.404-6 prescribes that no restrictions are to be placed on the release, distribution, or publication of the results of basic or applied research under contracts with universities and colleges. It would be beneficial if, because of the nature of such organizations, it were explicitly stated that Federally Funded Research and Development Centers were included within the ambit of this exemption.

Additionally, deletion should be made to the proviso that restrictions on release, distribution or publication of computer software that has been, readily can be, or is intended to be developed to the point of practical application are not considered restrictions on release, distribution or publication of the results of basic or applied research. The sole instance where imposition of such a provision by the Government would appear justified would be where the specific purpose of the contract is to develop computer software for distribution to the public by the Government. In other situations, computer software should be treated in the same manner as inventions under P.L.96-517, i.e. the title left with the Contractor and, subject to a) an appropriate license to the Government, and b) export and other laws, control of the intellectual property rests with the Contractor.

D. Standard Non-Disclosure Agreement

References: 27.405-2
27.410(c)
52.227-26

While the grant of Government Purpose Rights is in furtherance of the objective of developing regulations on rights in technical data that are fair and equitable to both the Government and industry, further effort must be directed to an implementation which achieves that objective. Particularly, it is not clear from the advanced notice of proposed rulemaking when the Standard Non-Disclosure Agreement of 52.227-26 would be used. Furthermore, the Agreement itself contains provisions which could be counterproductive to the objective of seeking to maximize competitive bidding in particular Government procurements. Restrictions imposed on a competing company ("the licensee"), limited to Government procurement purposes, with respect to the technical data of another party ("Contractor"), may be justified. However, deletion of the indemnification provision (paragraph 7), third party beneficiary provision (paragraph 8), and additional remedies provided to the Government, including assessment of court costs and attorneys' fees, (paragraph 9), is urged. Not only do these provisions present the specter of a financial risk of such

magnitude that the number of potential bidders cannot help but be diminished, but the provisions express a concept contrary to the assumption-of-risk philosophy with respect to intellectual property adopted and practiced by the Government since the era of the First World War. While some potential Contractors might not wish to assume the risk, others (e.g., state institutions) may not be permitted to do so. Further, to the extent the technical data contained intellectual property within the ambit of 28 U.S. Code 1498, the provisions of this agreement conflict with the Authorization and Consent clause which would be included in the terms and conditions of a specific procurement. Any relationship between the "licensee" and the "Contractor" should be voluntary, which was undoubtedly the intent of paragraph 10 which, as published, does not define a bilateral relationship.

E. Additional Data Ordering

References: 27.408(b)
27.410(h)
52.227-16

Experience has shown that in certain instances, such as planetary exploration flight projects, three (3) years after acceptance of all items to be delivered, or termination of the contract, is not be an adequate time to order data first produced or specifically used in the performance of a contract. In order to provide the necessary flexibility to accommodate such special situations, it is suggested that paragraphs (a) and (c) of 52.227-16, Additional Data Ordering, be amended as follows:

Additional Data Ordering (XXX 1990)

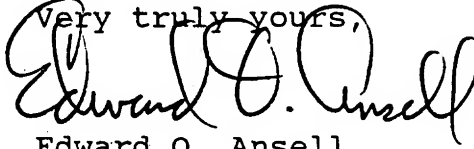
(a) In addition to the data (as defined in the clause at 52.227-14, Rights in Data, or other equivalent clause included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may, at any time during contract performance or within a term to be negotiated but no less than a period of 3 years after acceptance of all items to be delivered under this contract or the termination of this contract, order any data first produced or specifically used in the performance of this contract.

(c) The obligation to deliver the data of a subcontractor, pertaining to an item obtained from the subcontractor, shall expire at the end of the term negotiated but no less than 3 years after the date the

Linda W. Neilson
January 29, 1991
Page 5

prime Contractor accepts the last delivery of that item
from that subcontractor under this contract.

These limited comments have been submitted with the hope that
your committee will find them helpful in its deliberations. If
Caltech can be of further assistance, please contact me.

Very truly yours,

Edward O. Ansell
Director

EOA/sd

COGR

an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS

One Dupont Circle, N.W., Suite 670
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January 31, 1991

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Procurement Analyst
ODASD(P)/DARS
c/o OUSD(A)(M&RS)
Department of Defense
The Pentagon, Room 3D139
Washington, D.C. 20301-3062

Reference: FAR Case 90-438

Dear Ms. Neilson:

We are pleased to provide comment on the advanced notice of proposed rulemaking published at 55 FR 41788, dated October 15, 1990, regarding a uniform federal acquisition policy on rights in technical data and copyright.

The Council on Governmental Relations is an organization of over 130 universities and colleges. Its members are recipients of the predominant share of federal funds provided to perform academic research. We believe that the concepts proposed in this advanced notice of proposed rulemaking provide a positive move towards developing a policy to address the legitimate concerns of both government and contractors. Our comments focus first on general policy and are followed by specific technical suggestions.

I. GENERAL POLICY

1. Uniform, Government-Wide Rulemaking is Needed

We applaud the decision to establish uniform policy to be expressed in rulemaking that will replace the currently interim effective but divergent rules in DFARS 227.4 and FAR Part 27.4 for defense and civilian agencies respectively. We firmly believe that it is in the best interest of the government and of the academic community to have a single, government-wide policy on rights in technical data, software and copyright arising from federally funded research.

It is essential that such policy permit the contractor to retain rights to technical data, computer software, engineering drawings and other technical data generated under government contracts. We note that this advanced notice intends to embrace the dual thrust of uniform rules and contractor rights and prepares to realize it in rulemaking. As such, the agencies respond

cooperatively to Presidential Order 12951. We fully endorse this approach.

2. Universities Should be a Recognized Class of Contractors

We believe that the drafters of the regulations gave consideration to the importance of universities and colleges as performers of research and agents of technology transfer. There are scattered references to universities in Sections 27.404-5(c), 2.404-6(d), 27.410(e) and (h). There is one isolated reference to "non-profit" performers in 27.402(b). However, in studying the proposed rulemaking in its entirety, we are disturbed that, unlike small businesses, colleges and universities are not specifically addressed as a distinct group of federal contractors, although we have a clearly defined mission of research and education. Universities and colleges are not the largest recipients of federal dollars, particularly in the area of systems procurement. However, we are the largest providers of basic research, which is widely regarded as a principal source of new ideas; therefore, we are a significant factor in the transfer of many new technologies. We, therefore, ask that we be given focus in these rules.

3. Parallel Policy for Patents and Rights in Technical Data

Public Law 96-517 and its amendment Public Law 98-620 have clearly strengthened the relationships between universities and industry and have facilitated technology transfer to the marketplace. Reports by the General Accounting Office, issued in 1987 and 1984, support this claim. To continue on this successful path, we believe that policy on rights in technical data should parallel the government patent policy. Many technologies pursued today in university research are based on an inseparable fabric of inventions, technical data and software. Their licensing arrangements deal simultaneously with patents, copyright, trademark, the Semiconductor Chip Protection Act and other forms of proprietary rights. The effectiveness of these technology transfer programs will be severely limited unless we have a government-wide policy on rights in technical data and computer software which provides for contractor ownership and dissemination in terms that parallel the policy adopted for patents.

In summary:

From our perspective, three principles must be observed in the preparation of effective rights in technical data rules: 1) uniform, government-wide acceptance of contractor rights in technical data, computer software and copyrights; 2) the special needs of university contractors, given their educational and research mission; and 3) the favorable experiences with patent law, which should remain in harmony with newly designed technical data rules. The following technical points provide detail for modification of the proposed rule to realize these goals.

II. SPECIFIC TECHNICAL COMMENT

1. Government Purpose Rights

We endorse the new category of Government Purpose Rights. It meets the government goals of securing reprocurment and maintaining needed supplies as well as assisting in effective transfer of technology for the benefit of the general public. Universities believe that this new category will further their interests also.

The proposed rules contain some cumbersome procedures which we believe could be streamlined for more effective administration. We point to 27.404-4(c) and 27.405-2(a)(2) which impose requirements for additional negotiation and paperwork to identify and request Government Purpose Rights for selected data. We point to 27.404-4(d) and 27.405-2(a)(1), the need to segregate data according to how the development of these data has been funded. We point to the imposition of time limits with respect to how long such rights will be in effect at 27.404-4(e) and 27.405-2(a)(5). Also, the requirement to place notices on the data covered by Government Purpose Rights 52.227-14, Alt. II, is overly cumbersome and diminishes the ability of universities to retain the free flow of data which has been their custom in the past and is still provided for under the grant mechanism.

2. Copyright of Data

Universities would like to consider Alternative IV, to 52.227-14 (mistakenly labeled as Alt. I in the draft regulations) as a mechanism for defining data ownership. Federal law (Public Law 94-553) states that copyright protection exists in original works of authorship fixed in any tangible medium of expression, i.e., when expressed in writing and forwarded to the government. Alternative IV, as required by 27.410(e) for basic and applied research contracts with colleges and universities would be acceptable to most universities.

However, in prescribing such a clause it is unnecessary to require affixing the copyright notice (27.404-5(c)(4) and 52.227-14, Alt IV) as a requirement to claim copyright. We believe that Federal law has indicated that any claim to copyright does not require any such markings or registration with the Copyright Office. Consequently, incorporating such a requirement in rights granted under the copyright alternate simply adds additional burden on the contractor without having any bearing on whether the supplied data is legally copyrighted or not. This marking requirement should be dropped.

3. Decision Making by the Contracting Officer

The general preamble states at IIA. that it is a principal element of the proposed policy that the government obtain only such rights as it needs. However, there seems to be a great deal of latitude afforded to the contracting officer. Universities are

sensitive from past experience that such vaguely defined language may present problems. Reference is made to an appeals process, which would be part of any contractual relationship, but this is not spelled out in the proposed rules.

We ask, therefore, that the prescribing language for use of alternates or use of actual FAR clauses be reworded. Problems reside particularly in 27.404-5(c)(2) allowing exclusion of data from coverage under Alt. IV; and 27.405-2(a)(3) (iii), permitting the development of new regulations that would limit the use of the Government Purpose Rights.

Rewording should clearly direct the Contracting Officer to use only the least intrusive means to fill government needs. If necessary, the particular preferences to apply lesser rights on behalf of the government and the situations where greater rights will be taken might be enumerated in detail.

4. Publication

One of the fundamental principles for universities is the freedom to disseminate new knowledge through publication or exchanges with other researchers. Some of the proposed provisions threaten to conflict with these principles. For example, 27.404-6(b) implies that an agency might restrict distribution or publication of data; *ibid.*(d) indicates that it might restrict distribution or publication of software. At 27.405-2(b)(2) the agencies might impose requirements on methods of data distribution.

In 1985, the White House issued National Security Decision Directive 189 which specifically states that agencies are not to impose any restrictions on publication or dissemination of the results of fundamental research by any means other than classification. We believe that the sense of this directive ought to be incorporated into these regulations and that, for universities, restrictive references be removed. That Directive is appended to this letter.

5. Indemnity

We have some concern with 52.227-17, Rights in Data - Special Situations, where in subsection (e) the contractor is called upon to indemnify the government. We also point to 52.227-26. Most universities and colleges would be unable to provide such indemnification. As an alternative, particularly for 52.227-26, we suggest that an authorization and consent type clause similar to 52.227-1 would be more appropriate.

6. The Concept of Segregability

Segregability is defined as a funding test to be applied to items at the lowest practical identifiable level. Universities have particular problems with this concept because data provided under a contract are often the result of years of research, funded by

numerous sources of funding, including the institution's own resources. In such situations the lines are often very difficult to draw. These other sources of funding often delineate rights to the sponsor of such funding. As a consequence there are situations where limited or restricted rights to the government are in order, in recognition of that other funding.

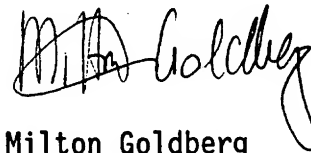
7. The Terminology "Developed and Necessary"

Special comment was requested as to whether the term "developed and necessary" might substitute for the deletion of the current "required for performance". We believe that this constraint should be deleted altogether. In general, we see a parallel to patent law, where a royalty free right to the government for government purposes has been adequate. As a general proposition the same right to the government ought to be adequate here.

In conclusion:

Given the nature of advanced notice of proposed rulemaking we have refrained from point-by-point analysis in order to concentrate on the broad design of the proposed rights in technical data rule. We appreciate that the public has been invited to participate in the discussion of these matters at an early time and we encourage the FAR Council in its pursuit.

Sincerely,

A handwritten signature in black ink, appearing to read "Milton Goldberg", with a stylized flourish at the end.

Milton Goldberg

Enclosure

THE WHITE HOUSE

WASHINGTON

September 21, 1985

NATIONAL SECURITY DECISION
DIRECTIVE 189

NATIONAL POLICY ON THE TRANSFER OF
SCIENTIFIC, TECHNICAL AND ENGINEERING INFORMATION

I. PURPOSE


This directive establishes national policy for controlling the flow of science, technology, and engineering information produced in federally-funded fundamental research at colleges, universities, and laboratories. Fundamental research is defined as follows:

"'Fundamental research' means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

II. BACKGROUND

The acquisition of advanced technology from the United States by Eastern Bloc nations for the purpose of enhancing their military capabilities poses a significant threat to our national security. Intelligence studies indicate a small but significant target of the Eastern Bloc intelligence gathering effort is science and engineering research performed at universities and federal laboratories. At the same time, our leadership position in science and technology is an essential element in our economic and physical security. The strength of American science requires a research environment conducive to creativity, an environment in which the free exchange of ideas is a vital component.

In 1982, the Department of Defense and National Science Foundation sponsored a National Academy of Sciences study of the need for controls on scientific information. This study was chaired by Dr. Dale Corson, President Emeritus of Cornell University. It concluded that, while there has been a significant transfer of U.S. technology to the Soviet Union, the transfer has occurred through many routes with universities and open scientific communication of fundamental research being a minor contributor. Yet as the emerging government-university-industry partnership in research activities continues to grow, a more significant problem may well develop.



II. POLICY

It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. Each federal government agency is responsible for: a) determining whether classification is appropriate prior to the award of a research grant, contract, or cooperative agreement and, if so, controlling the research results through standard classification procedures; b) periodically reviewing all research grants, contracts, or cooperative agreements for potential classification. No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.



DEFENSE CONTRACT AUDIT AGENCY
CAMERON STATION
ALEXANDRIA, VA 22304-6178

E



IN REPLY REFER TO

PAD 700.4/1001

25 JAN 1991

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

ATTN: Ms. Linda W. Neilson, OUSD(A)(M&RS)

SUBJECT: Comments on Proposed DFARS Coverage on Technical Data Rights,
FAR/DAR Case 90-438

In response to the 15 October 1990 Federal Register notice, we are providing comments on the proposed rule regarding rights in technical data.

One of our major concerns is the potential for duplicate government payment for technical data rights. For example, the contractor may negotiate for technical data rights with the Navy and then negotiate the same rights again with the Air Force, the result being duplicate government payment for the same data rights. We are not aware of any coordination among the various government agencies that would preclude this from occurring. Thus, we recommend that the interim rule be amended to require the contractor to identify in the proposal government agencies that proposed data rights have previously been sold to.

Another potential problem that we foresee in the interim rule concerns the concept of "developed exclusively at private expense." It is very difficult for the government to determine whether the particular technical data have been developed "exclusively at private expense," i.e., to determine that no portion of the technical data was developed under any government contract. The contractor is in the best position to make this determination. We therefore recommend that the contractor be required to include in the proposal submission a statement as to whether the proposed data were developed exclusively at private expense, i.e., that no portion of the technical data was developed in the performance of a government contract, nor were any associated costs charged direct to a government contract.

We urge that you consider our comments in finalizing a proposed rule on rights in technical data. While the above recommendations would not provide absolute assurance against duplicate payment or purchase of data rights to which the government is already entitled, they would help reduce the potential for such occurrence.

If you have any questions or desire further information regarding this subject, please contact Mr. David Capitano, Program Manager, or Ms. Frances Cornett, Chief, Accounting Policy Division at 274-6343.

William J. Sharkey
William J. Sharkey
Assistant Director
Policy and Plans



DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT MANAGEMENT COMMAND
DEFENSE CONTRACT MANAGEMENT DISTRICT NORTHEAST
495 SUMMER STREET
BOSTON, MA. 02210-2184



IN REPLY
REFER TO DCMDN-A

30 Jan 91

SUBJECT: 48 CFR Parts 27 and 52, Federal Acquisition Regulation (FAR); Rights in Technical Data Federal Register, Vol. 55, No. 199 October 15, 1990 (Proposed Rule)

TO: Defense Acquisition Regulatory System
ATTN: Colonel Nancy L. Ladd
Director, DAR System
ODASD(P)/DARS
c/o OUSD(A) (M&RS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

1. Reference page 41788 of subject Federal Register.
2. The following are comments to be considered in the formulation of a final rule regarding proposed changes to DFARS Interim Rule in Subpart 227.4, and the current FAR rule in Subpart 27.4 as well as to implement Section 1(b)(6) of Executive Order 12951:

a. 52.227-25(f)(1) - "Validation of Computer Software and Data Markings (Nonstatutory)": The 15 day period seems somewhat short for the time in which the Contractor or Sub-contractor has to avail itself of administrative or judicial review. Recommend 30 days be given a definition/clarification of what constitutes administrative review in the context of this paragraph.

b. 27.405-2 - "Negotiation of Government Purpose Rights": When the terms "Government funds" or "Government expense" are used, a statement should be added to the effect that IR&D funds are excluded as it relates to Government support, and how it is considered as it pertains to private expense.

c. Federal Register, paragraph III A, Use of the Term Required for Performance: The revised phrase "developed during and were necessary for the performance of this contract" only slightly revises the data/software to which the Government obtains unlimited rights. Data/software on projects initiated before a Government requirement but not completed until after the award of a contract would be

DCMDN-A
SUBJECT:

PAGE 2

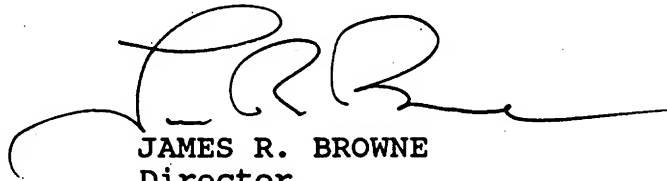
30 Jan 91

48 CFR Parts 27 and 52, Federal Acquisition
Regulation (FAR); Rights in Technical Data
Federal Register, Vol. 55, No. 199
October 15, 1990 (Proposed Rule)

included. The most current technology may not be utilized by contractors who fear the loss of proprietary data rights although this concern should be minimized where Government purpose rights are obtained.

d. Federal Register, paragraph III B - Commercial Products: Separate coverage will clarify rights to modified commercial data which could be a problem.

FOR THE COMMANDER:

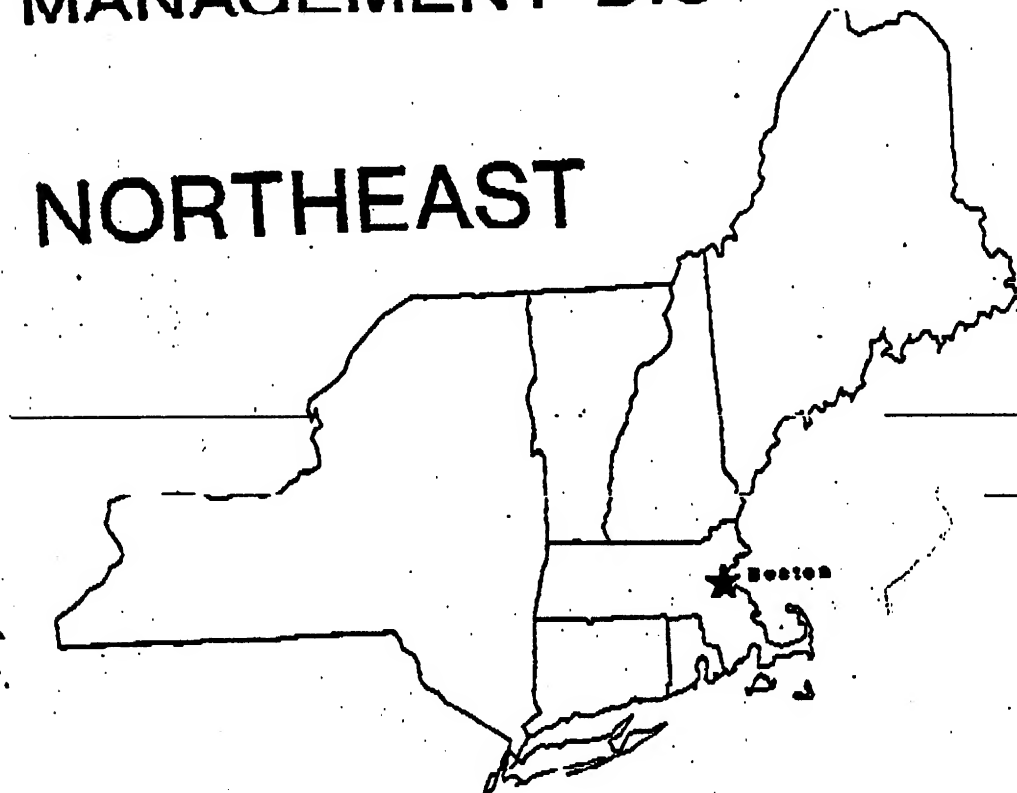


JAMES R. BROWNE
Director
Contract Management

LADD *NLadd*
Greene *LG*
Neilson *KN*

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5. TYPE, SOURCE, SUBJECT AND DATE OF DOCUMENT(S) TRANSMITTED Response to Federal Register, Vol. 55, No. 199; 48 CFR Parts 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000			
6. RELEASING OFFICIAL (Type/Print Name) Neil S. Miller		6a. SIGNATURE <i>Neil S. Miller</i>	
7. NAME OF COMMUNICATIONS CENTER OPERATOR & DATE-TIME-GROUP (Type/Print)			



DEFENSE LOGISTICS AGENCY
 DEFENSE CONTRACT MANAGEMENT COMMAND
 DEFENSE CONTRACT MANAGEMENT DISTRICT NORTHEAST
 495 SUMMER STREET
 BOSTON, MA. 02210-2184



IN REPLY
 REFER TO DCMCN-A

Tech Data

30 Jan 91

SUBJECT: 48 CFR Parts 27 and 52, Federal Acquisition Regulation (FAR); Rights in Technical Data Federal Register, Vol. 55, No. 199 October 15, 1990 (Proposed Rule)

TO: Defense Acquisition Regulatory System
 ATTN: Colonel Nancy L. Ladd
 Director, DAR System
 ODASD(P)/DARS
 c/o OUSD(A) (M&RS)
 Room 3D139, The Pentagon
 Washington, DC 20301-3062

1. Reference page 41788 of subject Federal Register.
2. The following are comments to be considered in the formulation of a final rule regarding proposed changes to DFARS Interim Rule in Subpart 227.4, and the current FAR rule in Subpart 27.4 as well as to implement section 1(b)(6) of Executive Order 12951:

a. 52.227-25(f)(1) - "Validation of Computer Software and Data Markings (Nonstatutory)": The 15 day period seems somewhat short for the time in which the Contractor or Sub-contractor has to avail itself of administrative or judicial review. Recommend 30 days be given a definition/clarification of what constitutes administrative review in the context of this paragraph.

b. 27.405-2 - "Negotiation of Government Purpose Rights": When the terms "Government funds" or "Government expense" are used, a statement should be added to the effect that IR&D funds are excluded as it relates to Government support, and how it is considered as it pertains to private expense.

c. Federal Register, paragraph III A, Use of the Term Required for Performance: The revised phrase "developed during and were necessary for the performance of this contract" only slightly revises the data/software to which the Government obtains unlimited rights. Data/software on projects initiated before a Government requirement but not completed until after the award of a contract would be

DCMDN-A
SUBJECT:

PAGE 2

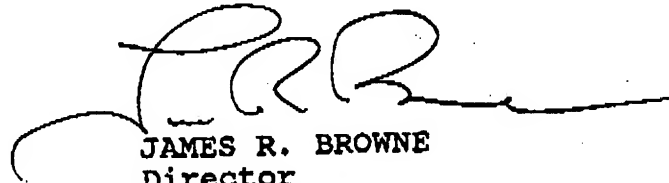
30 Jan 91

48 CFR Parts 27 and 52, Federal Acquisition
Regulation (FAR); Rights in Technical Data
Federal Register, Vol. 55, No. 199
October 15, 1990 (Proposed Rule)

included. The most current technology may not be utilized by contractors who fear the loss of proprietary data rights although this concern should be minimized where Government purpose rights are obtained.

d. Federal Register, paragraph 111 B - Commercial Products: Separate coverage will clarify rights to modified commercial data which could be a problem.

FOR THE COMMANDER:



JAMES R. BROWNE
Director
Contract Management



DEFENSE MAPPING AGENCY

8613 LEE HIGHWAY
FAIRFAX, VIRGINIA 22031-2137

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AQAQ

31 JAN 1991

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF DEFENSE (PROCUREMENT)

ATTN: Ms. Linda W. Neilson

SUBJECT: FAR/DAR Case 90-438: Rights in Technical Data

1. An advanced notice of proposed rule making to establish a rule on technical data for use by all government agencies to replace the current Federal Acquisition Regulation (FAR) subpart 27.4 and the current Department of Defense FAR Supplement (DFARS) Interim Rule in subpart 227.4 was published in the Federal Register on 15 October 1990. The Defense Mapping Agency (DMA) provides the following comments:

a. 27.402(c)(2). The last sentence states that in no event shall a contractor be required to sell its rights to data to the Government as a condition for obtaining the award of a Government contract. It is suggested a sentence be added to state that the Government does not have to accept an offer which restricts the data to "limited rights" or "restricted rights" when the Government has a definite requirement to openly disclose the data to be acquired under the contract.

b. 27.402. It is recommended that a section be added to discuss the flow-down of the data rights clauses to subcontractors.

c. 27.403(a). The first sentence is too long and confusing. It is recommended that the discussion of exceptions be placed in a separate sentence.

d. 27.404-1(c) and 27.404-2(d). These discuss the fact that a data base may contain data with different levels of data rights. It is requested that FAR address the marking of different levels of data rights within a single computer data base.

e. 27.404-5(b). It is recommended that the words "or to a contractor" be added to the second sentence so that it reads: "This applies to all data delivered to the Government or to a contractor with copyright notice, and to any further distribution the Government may make of the data, whether such data was first produced in the performance of the contract or not."

f. 27.404-5(c)(1), 52.227-14(c)(1), and 52.227-20(f)(1). DMA objects to the language in these paragraphs which state that the contractor may establish claim to copyright, without prior approval from the contracting officer, any scientific and technical articles based on or containing data first produced in the performance of a Government contract and published in academic, technical, or professional journals, symposia proceedings, or similar works. There are circumstances in which data is covered by security regulations, export controls, copyrights from other countries, and foreign agreements, and the contractor should obtain Government approval prior to publishing data produced in performance of the contract. By automatically granting the right to copyright any data that is published, it could encourage contractors to publish data that the Government is required to withhold from release.

g. 27.404-5(d). DMA obtains mapping, charting, and geodesy data in many different ways. Frequently the data covered by foreign copyrights are not marked. It is, therefore, recommended that the existing paragraph be made subparagraph (1), and a new subparagraph (2) be added to read as follows:

"Government works may be subject to foreign copyrights, treaties, or international agreements even when they are not so marked."

h. 27.404-6(a). The Government obtains data from many sources. It is often covered by security restrictions, export controls, copyrights from other countries, or foreign agreements. Therefore, it is suggested that this paragraph be amended as set forth below.

(1) It is recommended that the following be added to end of the first sentence:

"or be inconsistent with established programs or national policy."

(2) It is recommended that the following be added to the second sentence after "acting on behalf of the Government":

"or is given data which is controlled by third parties,"

(3) It is recommended that the following be added near the end of the second sentence after "in accordance with the markings":

"or other agreements,"

i. 27.404-6(b), (c), and (d). These subparagraphs contain references to nonexistent subparagraphs and subdivisions: "(a)(4), (a)(2)(iii), and (a)(2)."

j. 27.404-6(c). This subparagraph is ambiguous.

k. 27.404-6(d). Since the subparagraph referenced here does not exist, it is not clear exactly what is intended by the statement that no restrictions are to be placed on the release, distribution, or publication of the results of basic or applied research under contracts with universities and colleges. Since colleges and universities frequently bid on DoD research contracts which are covered by national security, export control regulations, treaty, or foreign copyright law, it hoped that this data rights coverage will not conflict with those restrictions.

l. 27.406(a). DMA requires exclusive rights to the data delivered under and/or used in the performance of many of its contracts. This is due not only to the sensitivity of the data, but also because it is frequently covered by international agreements which prohibit disclosure. It is requested that 27.406(a) be revised to include the following subparagraph (ix):

"(ix) The gathering, production, compilation or manipulation of mapping, charting and geodesy data in any form."

m. 27.408(d)(3). This states when the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment, is used, the section of the contract specifying data delivery requirements shall expressly identify those line items of technical data to which the clause applies. It is recommended that this be changed to state the clause will apply to all data (or technical data) delivered under the contract unless specifically listed as an exemption in the clause itself. Otherwise, each agency could be using a different method .

n. 27.410(q). This includes a requirement that the contracting officer shall insert the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment, in all contracts, with the suitable alternative selected in contracts for major systems acquisitions or for support of major systems acquisitions. However, 27.408(d)(1) states that the clause is to be included in all contracts as

prescribed by agency supplements. Is it intended that the clause should be included in all contracts? Why should it be included if data is not being delivered? Since this proposed FAR coverage is to apply to all Government agencies, why is it relying on agency supplements to determine what is required?

o. 52.227-14(d)(2). DMA obtains and uses data subject to foreign agreements which is not so marked; therefore, it is recommended that the following be added after "or contain other restrictive markings":

" , or are otherwise controlled or subject to agreements, "

p. 52.227-17. In order to further protect the rights of the Government, it is required that this clause be revised as set forth below.

(1) Add to paragraph (b)(1) which says the "The Government shall have --":

"(iv) The right, at the completion of the performance of the contract, to direct the contractor to either destroy or return to the Government all data delivered under the contract and all data first produced under the contract."

(2) Add paragraph (f) to read essentially as follows:

"(f) Subcontracting. This clause shall be included in all subcontracts of any tier."

(3) It is recommended that this clause be included in solicitations and contracts in full text.

q. 52.227-19(d)(2)(iv). The referenced subdivisions should be (d)(2)(i), (ii), and (iii).

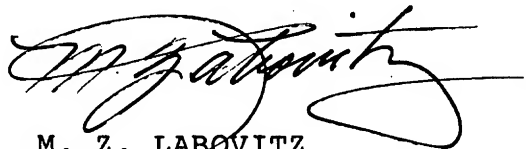
r. 52.227-19(e). The last sentence states that in the case the Government and others acting on its behalf shall have a license under copyright to use and reproduce such manuals and instructional materials for Government purpose only, without disclosure prohibitions. Please clarify what is meant by "without disclosure prohibitions." This term is used throughout the proposed rule, and for the layman, it is not clear that copyright law contains both disclosure and copying rights. This proposed rule does not adequately explain the two.

s. 52.227-21(c)(1). The first sentence references a paragraph "(d)"; however, there is no paragraph "(d)" in this clause.

2. In addition to the proposed rule, the advanced notice highlighted other issues for specific consideration. One issue concerns the use of the term "required for performance." In determining what is to be delivered with unlimited rights, the proposed rule uses "developed during and were necessary for the performance of the contract" in lieu of "required for performance" that is in the current DFARS coverage. Paragraph III. A. of the highlights for consideration suggests two possible alternatives to be added to the standard data rights clause to cover the situation when a contractor may discover after award that it is necessary to develop some other item or process that was not specified in the contract. One alternative is that the contractor would notify the Government so that the parties can determine what rights the Government should acquire. Another alternative is that in this situation, the Government would acquire only Government Purpose Rights. DMA disagrees with both suggested alternatives. The current and the proposed rules give the Government unlimited rights in this situation. We do not feel that the contractor should automatically be allowed to come in during performance to open negotiations on data rights. This type of rights should be negotiated on an exception basis when a contractor feels they are justified.

3. Point of contact is Mrs. Kathy Garcia, DMA(AQAQ), (703) 285-9199.

FOR THE DIRECTOR:



M. Z. LABOVITZ
Deputy Director for Acquisition,
Installations and Logistics



DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY COMMUNICATIONS-ELECTRONICS COMMAND
AND FORT MONMOUTH
FORT MONMOUTH, NEW JERSEY 07703-5000

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REPLY TO
ATTENTION OF

January 31, 1991

Legal Office

Ms. Linda W. Neilson
Procurement Analyst
ODASD(P)/DARS,
c/o OUSD(A)(M&RS)
Room 3D139, Pentagon
Washington, DC 20301-3062

Dear Ms. Neilson:

The following comments are provided relative to FAR/DAR Case 90-438, dealing with Rights in Technical Data and Computer Software, consistent with the announcement in the Federal Register, Vol. 55, No. 199.

1. Modify 52.227-14(b)(1)(i)(B) by including the phrase "or any other Government contract" after "this contract". This will make it clear that such data should be delivered with unlimited rights even though potentially first ordered on this contract.

2. Unless it was the committee's express intention, I suggest changing the unlimited rights introduction at 52.227-14(b)(1)(i) to eliminate the notion that data first produced in the performance of the contract be delivered with unlimited rights. The Government could argue that this would apply to data related to items developed outside of any Government contract at private expense if the data itself was first produced under the contract. This is a significant change in favor of the Government but isn't really fair to the contractor community.

3. In general I would suggest using a different approach to copyright than that of the proposed regulation. The Government's rights in technical data and computer software should be independent of whether or not the contractor has registered a copyright for that technical data or computer software. Copyright licenses should be obtained to an extent consistent with the technical data or computer software rights obtained by the Government. If a separate approach is taken to registered copyrighted data the license obtained therein should include the right for the Government to allow third parties to do that which the Government is entitled to do. As a minor point I would suggest changing the wording of the clause to adopt to the proposition that most everything now written is technically copyrighted notwithstanding the fact that it may not be registered.

4. I caution against the use of any data rights clause which effects the content of the deliverable data. Historically this has never been the case and the proposed regulation, in my estimation, places the Government at too much risk that an uninformed contracting officer might inadvertently delete data which, if not delivered, would render the entire contract effort inadvisable. The scope of the data to be delivered should remain the the requiring activity, that is, the generator of the DD-1423. The data requirement, as differentiated from the rights in data requirement, can be easily modified by the requiring activity by DD-1423 modification. Accordingly, I am not in favor of Alternative 1 to 52.227-14. In any case, the concept of accepting and paying for "form, fit and function computer software" is scary. As a minimum, I suggest deletion of computer software from this Alternate.

5. The two validation clauses, FAR 52.227-24 and FAR 52.227-25 have different standards for retention of records; viz., "sufficient to reasonably justify the validity", and "adequate to justify the validity", respectively. Are the standards really different? If not, why not use the same language?

6. The procedures for validation are different for the statutory and non-statutory data. Do the agencies gain a sufficient advantage to justify a different procedure?

7. FAR 27.404-5(b) contains an error, and the error is repeated elsewhere. See, for example, FAR 52.227-14(c) and FAR 52.227-17. The nature of the license is broad and includes a "worldwide" license. That is, the phrase should not be "irrevocable, or worldwide", but should be "irrevocable, worldwide."

Thank you for the opportunity to remark on these proposed regulations. The above comments are not intended to discuss or belittle your efforts. There is enormously more good to say about the proposed regulations than bad. They are submitted solely to point out the primary areas where I feel the regulations may be improved to the benefit of all parties.

Very truly yours,

Michael Zelenka

Michael Zelenka
Chief
Intellectual Property Law Division



DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY COMMUNICATIONS-ELECTRONICS COMMAND
AND FORT MONMOUTH
FORT MONMOUTH, NEW JERSEY 07703-5000

REPLY TO
ATTENTION OF

January 31, 1991

Legal Office

Ms. Linda W. Neilson
Procurement Analyst
ODASD(P)/DARS,
c/o OUSD(A)(M&RS)
Room 3D139, Pentagon
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Very truly yours,

Michael Zelenka

Michael Zelenka
Chief

Intellectual Property Law Division



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Technology
Washington, D.C. 20230

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JAN 24 1991

Ms. Linda W. Neilson
Procurement Analyst
ODASA(P)/DARS
c/o OUSD(A) (M&RS)
Room 3D139, Pentagon
Washington, D.C. 20301-3062

Re: Comments on Advanced Notice of Proposed
Rulemaking; Federal Acquisition
Regulation Pertaining to Rights in
Technical Data (FAR/DAR Case 90-438)

Dear Ms. Neilson:

These comments express the views of the Department of Commerce concerning the advanced notice of proposed rulemaking relating to the treatment of rights in technical data in the Federal Acquisition Regulation, published in the Federal Register of October 15, 1990. The attached comments from the U.S. Patent and Trademark Office of the Department of Commerce provide specific comments on some technical aspects of the proposal.

Summary

In our view the proposed regulatory language is inconsistent with the mandate of Executive Order 12591 and would require substantial revision in order to further advance this policy. The Executive Order instructs all agencies to "cooperate, under policy guidance provided by the Office of Federal Procurement Policy, ... in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for a royalty-free use by or on behalf of the government." It is our belief that the draft regulation contained in the advance notice does not meet this goal. We therefore recommend that it be withdrawn in order that some revisions might be made with OFPP. The Department of Commerce would like to contribute to that effort and the attached comments are meant to assist in that regard.

The Importance of Encouraging Commercialization Through the Procurement Process

The substantial convergence between technologies essential to our national security and those important to our economic security is becoming increasingly obvious. All of the technologies identified on the Department of Commerce's 1990 list

of Emerging Technologies are represented on the Critical Technologies list compiled by the Department of Defense for the same year. In its recent "Report to Congress on the Defense Industrial Base", the Department of Defense identified eight priority technology areas "where national security interests appear to coincide with national economic interests." The development of these technologies is so interrelated that it would be impossible to separate them.

The procurement process presents an important opportunity to improve the ability of the private sector to develop commercial applications for these important new technologies. We recognize the importance of ensuring that the government is able to reprocur items in an efficient and cost-effective manner. However, we believe that it is possible to provide for the allocation of technical data rights in the procurement process in a manner that protects the government's needs while also making it possible for the private sector to engage in commercialization.

An appropriate recognition of contractor data rights will facilitate government purchase of commercial products embodying state-of-the-art technology, strengthening the markets for such products and helping to reduce unnecessary distinctions between defense and commercial markets. Such a resolution is not only important to large prime contractors, but even more so to innovative small business subcontractors. These companies must seek commercial as well as government markets for their products in order to survive. We must ensure that such companies are not driven away from government contracts by overly restrictive technical data and software procurement regulations that cause them to fear the loss of their commercial markets.

Unfortunately, the advanced notice sets up a regulatory scheme that is inimical to the goal of increased opportunities for commercialization. The regulatory language contained in the advanced notice would greatly undercut the ability of the Department of Defense and government contractors to seek commercial as well as military applications for new technologies and processes arising from the substantial amounts spent annually for defense procurement. The regulatory language would not only be unfortunate for contractors, but would squander an opportunity to strengthen U.S. competitiveness at a time when U.S. industry faces unprecedented international competition.

The Proposed Regulation Will Not Encourage Commercialization of Technology Arising from Procurement Contracts

Rather than following the Executive Order's direction to limit government data rights to those essential for the government's limited needs, the advanced notice makes it very difficult for contractors to establish their right to protect

technical data and software. This is accomplished through a veritable maze of regulatory language and contractual clauses. Even if this maze is successfully negotiated by a contractor, there is no certainty that sufficient protection of rights will be achieved to justify efforts to commercialize the data. Indeed, the discussions of Government Purpose Rights in the proposed regulation are extremely abstract in their descriptions of the rights retained by the Government. It is difficult to determine what practical protection will be provided to the contractor under this concept.

Finally, the proposed regulation makes particularly awkward use of the U.S. copyright laws and imposes obligations on contractors that are, in some respects, inconsistent with that law. The purposes and objectives of the regulation would be better accomplished through the use of conventional methods of transferring rights, such as assignments and licenses. Specific deficiencies in the proposed regulation are more fully developed in the attachment to this letter.

The most critical defect of the proposed regulation is its requirement that the Government be given unlimited rights in technical data unless the contractor meets the requirement of showing that the Government should receive more limited rights. Proposed Section 27.404.1 purports to give the Government unlimited rights to technical data first produced under the contract unless the contractor petitions to protect technical data or software under the copyrighted data section (§ 27.404-5) or the Government purpose rights section (§ 27.404.4). There is no guarantee that this petition will be granted. This sort of case-by-case petitioning is exactly what the Executive Order sought to avoid and is inconsistent with U.S. copyright law.

The proposed regulation also purports to give broad discretion to contracting officers to make whatever disposition of rights they think is appropriate, without regard to the objectives of the Executive Order or the provisions of U.S. copyright law. Proposed Section 27.404-5 provides that the contractor will normally receive protection for copyright data and software unless:

- "(iii) The data are of the type that the agency distributes to the public under an agency program to disseminate such information;
- (iv) The contracting officer determines that limitations on distribution of the data are in the national interest;
- (v) The contracting officer determines that the data should be disseminated without restriction."

A related example occurs in Section 27.405-2, "Negotiation of Government purpose rights." Even after the contractor has asked for commercial rights to data and documented the petition

as required, the contracting officer is said to have the authority to deny the petition if "the agency has established programs pursuant to statute, regulation or policy to disseminate the data ...". (Emphasis Supplied)

Such provisions underscore the need for OFPP oversight in the drafting of this regulation. Rather than revising current agency practices to bring them into line with Administration policies and U.S. copyright law, the advanced notice simply protects the status quo. Agencies should bring their regulations and policies into accord with the law and the Administration's policy mandates, not vice versa. Finally, one of the most damaging provisions sets limits on the period available to the contractor for commercialization. Sections 27.405-2(5)(i) and (ii) provide that, even if the contractor succeeds in deciphering the appropriate clauses and alternate clauses, documents the need for rights, and convinces the contracting officer to grant them, those rights are subject to strict time limitations. After 3-5 years the agency will make the data and software publicly available!

This limitation runs directly counter to the Executive Order and would greatly reduce the incentive of contractors to commit the significant funds and other resources needed to develop and market new products. Commercialization is a difficult, risky process. Authorizing the U.S. Government to give away data and software being commercialized after an arbitrary time period sends the wrong signal to the private sector about this Administration's commitment to promoting commercial uses of Government-funded research and development.

Conclusion

The Administration has clearly stated, in the recent "U.S. Technology Policy", that its goal in revising procurement policies is not only to secure our national security, but to strengthen "the abilities of the companies involved ... to use the same research results and technologies for commercial purposes." The Department of Commerce suggests that the proposed regulation be revised to conform to this standard. Mr. Joseph P. Allen, Director of the Office of Technology Commercialization (202-377-8100), is the point of contact in the Department of Commerce on this issue.

Sincerely,



Robert M. White

U.S. Patent and Trademark Office
Comments on FAR/DAR Case 90-438

General Comments

These regulations set forth four categories of rights to be dealt with in government contracts that involve the generation or transfer of "technical data": unlimited rights, limited rights, restricted rights, and government purpose rights. Different rights and obligations are applicable to each category. Because these categories call for an awkward application of the copyright laws and confuse issues involving the "data" and its expression, consideration should be given to defining the categories in copyright terms. Such definitions could make the structure of the regulations simpler by separating issues about the protection of the "data" from the protection of its form of expression.

In most instances, the contractor has a copyright because of the nature of the work ("technical Data") that is created. Copyright arises automatically under Title 17 and its existence is not dependent on registration or use of a copyright notice. Consequently, the government does not "permit a contractor to copyright," and the contractor is not required to take any affirmative steps to "obtain" a copyright.

Transfers of rights between the contractor and the government should be couched in terms of assignments, licenses, license-backs, etc. In the limited circumstances where a work constitutes a work of the United States Government or a "work-for-hire" of the U.S. Government, no copyright exists for such works in the United States because of the denial of copyright to such U.S. Government works in 17 U.S.C. 105. However, such works are protected in foreign countries that protect government works with which we have copyright relations.

Specific Comments

1. The title, "Federal Acquisition Regulation (FAR) Rights in Technical Data," is misleading. "Technical data" is expressly defined to exclude computer software on page 41793, column 1, and a large part of the regulations deal with rights in computer software. The language of the title should reflect that. Perhaps language such as that used in the "Scope of subpart" section on page 41792, column 1 could be used, i.e., "technical data and computer software."

2. Page 41789, Column 2, Under "1" - The language, "unless the contrator [sic] is permitted to copyright," is incorrect. Because, as noted in the General Comments, something is either copyrighted or not based on the facts of its creation. Language such as, "unless the contractor is permitted to retain the rights to a copyright" would be more appropriate.

3. Page 41789, Column 3, Under "D" - For the same reason given in Comment 2 above, the language, "enable a contractor to be permitted to copyright" should read, "enable a contractor to retain the rights under copyright."

4. Page 41790, Column 1, Under "E" - In the sentence beginning, "Thus source code listings, design details," "algorithms" "processes" and "formulas" should be deleted. Because copyright protects only forms of expression of such "ideas," they should not be included in the same list as copyrightable works. This sentence reflects the continuing failure in these regulations to separate true technical data from the expression of that data.

5. Page 41791, Column 3, Under "D" - Government purpose rights are available "when requested" and are described as providing "an incentive to achieve commercial use . . . [or] a balancing of interests." Such language is awkward. Rights to a copyrighted work belong to the contractor who created the work, unless such rights are assigned to the government. At most, the government acquires a license to do certain things. Perhaps government purpose rights should be couched in terms of the government "licensing back" rights to the contractor.

6. Page 41792, Column 1, Under "27.400" and "27.401" - The definitions of "data" and "computer software" are circular. "Data" is defined to include computer software and "computer software" is defined to be data. Perhaps the definition of "computer software" should not include the word, "data," and should begin with "comprising."

7. Page 41792, Column 2 - "Detailed design, manufacturing, or process data" is defined in terms of technical data and, at the same time, implies computer programs. But, technical data was expressly defined to exclude computer software on page 41793.

8. Page 41792, Column 2-3 - The definition of data both includes and excludes itself as a part of its own definition. Perhaps the sentence, "The term does not include data incidental . . . " should read "The term does not include financial, administrative, cost and pricing, or management information which is incidental to the administration of a contract."

9. Page 41793, Column 2, Under "(b)" - The language "property rights in intellectual property such as rights in technical data and computer software" implies that technical data and computer software are forms of intellectual property. Intellectual property includes such things as patents, trademarks, and copyrights, and not the subject matter of patents, trademarks, and copyrights. Perhaps this should read, "intellectual property rights such as copyrights in technical data and computer software."

10. Page 41794, Column 1, Under "(2)" - This provision conflicts with the basic principles of the U.S. copyright law. As previously mentioned, copyright protection is automatic under title 17 and does not depend on either use of a copyright notice or on registration. This provision has the effect of requiring notice of copyright. If applied to works of foreigners, this requirement is contrary to the provisions of the law which eliminate any requirement of notice for works of any Berne Convention member. Requiring use of the copyright notice violates the Berne Convention's prohibition against formalities.

11. Page 41794, Column 2, Under "(a)" - The parenthetical, "(as that term is defined)," should be deleted. It insinuates that where the parenthetical is not used, words could mean something other than that defined in the regulation.

12. Page 41794, Column 3, Under "(d)" - The first word, "Data," should be changed to "Information." As presently written, "data" does not include computer software. But, "data" was previously defined in 27.401 to include computer software.

13. Page 41794, Column 3, Under "(d)" - The last sentence of the column requires "marking with appropriate legends or copyright notices." If applied to foreigners, this requirement violates the Berne Convention's prohibition against formalities. See Comment 10 above.

14. Page 41795, Column 1, Under "(a)" - The verb tense of the last sentence of the first paragraph is inconsistent. Note, "computer software is to be acquired . . . or are to be made subject."

15. Page 41795, Column 1, Under "(b)(1)" - Is there any reason for the difference in language used in "(i) Use, or copying for use" and "(ii) Use, or copy for use"?

16. Page 41795, Column 2, Under "(4)" - The paragraph begins with a reference to "data, including computer software." The remainder of the paragraph refers only to computer software. Does the paragraph apply to all data or only to computer software?

17. Page 41795, Column 3, Under 27.404-4 - The language, "Government purpose rights enable a contractor to retain limited exclusive commercial rights," is inappropriate. Perhaps this should read "With government purpose rights, a contractor retains limited exclusive commercial rights." This

language more clearly indicates that the government does not affirmatively grant the rights but that the rights result from licensing arrangements. See Comments 2 and 3 and General Comments above.

18. Page 41796, Column 1, Under "(b)" - Paragraph (3) does not appropriately follow the introductory phrase for two reasons. First, the word "either" should be used to indicate only two alternatives. Second, if paragraph (3) is read immediately following the introductory phrase, it reads, "may be used to either . . . or (3) where" (emphasis added).

19. Page 41796, Column 1, Under "(b)(3)" - The word "mutually" is redundant. If they agree, it is mutual.

20. Page 41796, Column 2, Under "(g)" - "Contractor . . . may elect to copyright the data" is inappropriate language. The material is either copyrighted or not based on what it is and the status of the author. See Comments 2, 3 and 17 above.

21. Page 41796, Column 2, Under "(5)(b)" - "The Government's policies in permitting a contractor to establish claim to copyright" is inappropriate language. See Comments 2, 3, 17, and 20 above.

22. Page 41796, Column 3, Under "(c)" - The language, "may establish claim to copyright," is inappropriate. See Comments 2, 3, 17, 20, and 21 above.

23. Page 41797, Column 1, Under "(4)" - This paragraph requires the Contractor to "affix the applicable copyright notice." Such a requirement can be made with respect to U.S. copyright owners, but not foreign copyright owners. The Berne Convention prohibits formalities of notice. See Comments 10 and 13 above.

24. Page 41797, Column 3, Under "(3)" - Reference is made to "technical information." How does this relate to "technical data"?

25. Page 41800, Column 2, Under 27.406 - The material in this section does not appear to be properly addressed under these regulations. The "Scope of the subpart" section on page 41792 limits the regulations to "technical data and computer software," and this material does not fit that category.

26. Page 41800, Column 3 - Is there any substantive difference between (v), (vii), and (viii)? They each use different words to define seemingly the same concept.

27. Page 41802, Column 1, Under (a) - As mentioned in Comments 10, 13, and 23 above, if the notice requirement is applied to foreigners, it violates the Berne Convention's prohibition against formalities.

28. Page 41802, Column 2, Under (a) - The definition of "technical data" on page 41793 expressly excludes computer software. Repeated reference to "(but not computer software)" is redundant.

29. Page 41802, Column 3, Under (1) - The language "after consulting with the activity" is confusing. Does this mean "after consulting with the personnel involved in the activity"?

30. Page 41805, Column 3, Under (e) - Copyrights do not have "claims."



U.S. Department of Justice

J

Washington, D.C. 20530

JAN 30 1991

Ms. Linda W. Neilson
Procurement Analyst
ODASD(P) DARS, c/o
OUSD(A) (M&RS), Room 3D139
Pentagon, Washington, D.C.
20301-3062

Dear Ms. Neilson:

This is in response to your request for comments concerning the advance notice of proposed rule making, Federal Acquisition Regulations (FAR)/Defense Acquisition Regulations (DAR) Case 90-438, Rights in Technical Data, which was published in the Federal Register on October 15, 1990 (55 Fed. Reg. 41788-41815).

We have reviewed the advance notice of proposed rule making and have no substantive comments. Thank you for the opportunity to review FAR/DAR Case 90-438.

Sincerely,

for *Wilson L. Vann*

W. L. Vann
Procurement Executive
Justice Management Division



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

K

February 1, 1991

Ms. Linda W. Neilson
ODASD(P)DARS
c/o OUSD(A)(M&RS), Room 3D139
The Pentagon
Washington, DC 20301-3062

Dear Ms. Neilson:

This responds to your request for comments on FAR/DAR Case 90-438, "Rights in Technical Data."

We are pleased that you have undertaken the task of preparing one unified policy applicable to both the Defense Department and the civilian agencies. Please see Enclosure (1) for our specific comments and recommendations. We would also recommend that once this rule becomes final, a series of training seminars be given to all contracting personnel.

If you have any questions regarding our submission, please contact Mr. Vince Careatti on (202) 366-4278.

Sincerely,

Linda M. Higgins
Director of Acquisition and
Grant Management

Enclosure

cc: General Services Administration/KMPR
18th and F Streets, N.W.
Washington, DC 20405
ATTN: Ms. Anne Horth

GENERAL COMMENTS

The regulation fails to provide for limited rights in data by agreement, as was available under earlier versions of the DFARS. It appears that the only way to acquire data with limited rights is to agree that the data was indeed developed exclusively at private expense and outside of any Government contract, or to engage in the full-blown validation procedure. It might be useful to avoid this problem where the funding situation is not clear and it would not be cost effective to fight out the rights, or where failure to mark data leads to uncertainties over what actually qualified for limited rights protection.

It appears that the proposed regulation does not set a minimum standard of rights which the Government must accept in limited rights data or restricted rights software. The DFARS had provided that the Government could not accept less-than-limited rights in data or less-than-restricted rights in software. The present FAR seems to allow for some flexibility in this area. Won't this lead to problems with application of the Christian Doctrine if the Contracting Officer fails to deal with data rights?

The policy guidance accompanying the "Special Situations" clause does not indicate that use of this clause will subordinate the contractor's standard software license to Federal statute and the FAR, although the clause itself does. This is an improvement over the present FAR, where the equivalent clause addresses conflicting items affecting rights in software only.

The proposed rule calls for the Contracting Officer to make a number of determinations relevant to the clauses and provisions to be used and the Government's negotiating position. With the exception of the determination of whether there are reasonable grounds to question the validity of restrictive markings (27.407-2(d)(1)), none of these determinations appear to be required in writing. We believe it advisable to set forth a requirement for the Contracting Officer to document the file with a written determination or statement setting forth the Government's objectives in regard to technical data, the clauses to be used and negotiation factors. We also believe that the Contracting Officer should be required to consult with the Agency's counsel which has cognizance of the Agency's rights in data affairs.

SPECIFIC COMMENTS KEYED TO INDIVIDUAL SUBPARTS

27.401

Developed: We believe that extending the definition of "developed" to software is not going to be well received by the contractor community, although it is welcome to the Government. The definition pushes the point at which development takes place far down the road from the present position taken by industry.

Developed exclusively at private expense: After the word "accordance" in the 16th line insert "with generally accepted accounting principles for those contracts..."

Government Purpose Rights: We believe that this definition should explicitly state that the right to use data for reprocurment is a Government purpose. Does the intent of the definition exclude commercial use as a Government purpose?

27.402 Policy

(c) Balancing of the interests.

Subparagraph (1): 6th line delete the words "assuring protection for" and insert "respecting."

Subparagraph (2): The first sentence implies that the contracting officer's responsibility is to both the Government and the contractor. If the parameters within which the Contracting Officer must consider the contractor's interests is confined to that set forth in this paragraph, then this should be defined. We also note that in FAR 1.602-2, where the responsibilities of Contracting Officers are delineated, Contracting Officers are charged to safeguard "the interests of the United States in its contractual relations", not the contractor's interests.

27.404-2 Limited Rights data: Subparagraph (4) requires DoD agencies to notify the owner of data when limited rights data is released outside the Government. For the purpose of consistency and a common rule, we believe this notice should apply to civilian agencies as well.

27.404-4(d) Government purpose rights and 27.405-2(a)(1) Negotiation of Government purpose rights: A definition of "lowest practicable identifiable level" should be added to 27.401 "Definitions."

27.404-5 Copyrighted data:

(b) We believe that the underlying basis for this subparagraph is incorrect since the Berne Convention does not require a copyright notice to establish a copyright. We assume that the action contemplated is registration of the copyright, since the right exists once the expression is fixed in some medium of expression. The subparagraph should make this distinction clear.

(c)(1) Fourth sentence states that "Permission to copyright should be granted in all software procurements under a GSA Delegation of Procurement Authority (DPA)." A basis for this statement should be included (i.e. statute or regulation). Since the permissive verb "should" is used instead of "shall," examples should be provided when permission should not be granted.

(c)(3) Contains an error, and the error is repeated elsewhere. See, for example, FAR 52.227-14(c)(3) and 52.227-17. The nature of the license is broad and includes a "worldwide" license. That is, the phrase should not be "irrevocable, or worldwide", but should be "irrevocable, worldwide."

27.404-6

(b) There is no subparagraph (a)(4) to this subsection as referenced in the first sentence. Add the words "in writing" after "head of the contracting activity."

(c) There is no subparagraph (a)(2)(iii) to this subsection as referenced in the first sentence.

(d) There is no subparagraph (a)(2) to this subsection as referenced in the first and third sentences.

27.405-1(e)(3) The statutory prohibitions (which forbid the Contracting Officer from making the offeror's willingness to grant less-than-unlimited rights in privately developed data a "drop dead" factor in evaluating the proposal) is now extended to civilian agencies. We believe the statute was only binding on

the Secretary of Defense. If this factor is being extended to the civilian agencies then guidance must be provided to Contracting Officers on how to assess the contractor's data rights restrictions in the life cycle cost analysis.

27.405-2 Negotiation of Government purpose rights.

(a)(2)(i) Delete the word "some" before "evidence" and before "documentation", since the word lacks a credible definition.

(a)(2)iii) Is anything besides a simple affirmation in the "positive statement of intent to commercialize the item..." required? We believe a written explanation of intent or plan should be provided to the Contracting Officer.

In the next to the last line, we believe the word "prices" should be changed to "process."

27.405-3 Additional negotiations: This section provides that greater or lesser rights may be negotiated before or after contract award, but appropriate language has to be developed by the Contracting Officer and incorporated into the contract. Does this mean that the Contracting Officer may agree to take less-than-GPR in data developed exclusively at Government expense? Can the Contracting Officer agree to limited rights in cases where the contractor cannot substantiate development exclusively at private expense?

27.407-1 Omitted and nonconforming markings

(a)(4) After the word "use" in the third line, add "or reproduction (see clause 52.227-14, subparagraph (e)(1)(iv))."

(b) Is the Contracting Officer required to notify the Contractor when nonconforming markings are stricken by unilateral action? We believe notification should be made.

27.406 Other Data Rights Provisions

We recommend that the clause title be included at all the references to 52.227-19 throughout the subparagraph.

(b) This subparagraph permits agencies to require the assignment of copyrights to the Government in stated circumstances. We believe that there should be a sample assignment available in the FAR.

(b)(2) The Contracting Officer is given wide discretion in ordering or not ordering data. We believe that the Contracting Officer should exercise care when using this discretion to avoid permitting the contractor to withdraw essential data from the coverage of the "Additional Data Ordering Clause" at FAR 52.227-16. Perhaps the clause should draw attention to the risk in exercising his/her discretion.

27.410 Solicitation provisions and contract clauses

(h) Why is a dollar limit placed on the applicability of FAR 52.227-16? We believe the limit should be removed.

(l) After the word "awarded" delete "established."

52.227-14 Rights in Data

(b)(1)(i) Change the word "no" to "not".

(b)(3)(iii) Fourth line change the word "or" to "and".

Restricted Rights Notice-Long Form

(b)(2) First line after the word "in" add "or with".

(d) We believe that examples of sources such as, executive orders (E.O. 12356 "National Security Information"), should be cited in order to give the Contracting Officer guidance.

Government Purpose Rights Notice - Alternate I.(XXX 1990)(Federal Register Notice Page 41809) should be changed to Alternate IV.

52.227.15 Notification of Data Deliverable With Other than Unlimited Rights (XXX 1990)

(c)(2) The word "tis" in the second line should be "this."

(c)(2)(i),(iii) and (iv) insert "which" before the words "have been."

52.227-17 Additional Data Ordering. The clause number should be "16" and not "17."

Additional Data Ordering (XXX 1990). In the first line, subparagraph (d), delete "or are."

52.227-19 Commercial Computer Software

(d)(2)(iii) After the word "restricted" insert the words "rights computer."

(d)(1)(iii) change "(d)(1)(i),(ii)" to read "(d)(2)(iii)"

(d)(3) change the word "license" to "licensed"

52.227-20 Rights in data-SBIR Program

(a) Definitions.

Computer Software in the next to the last line, after the word "the", insert "computer".

Form, fit and function data, in the third line, after the word "software", insert the word "programs".

Unlimited Rights after the word "Government" in the second line, add the words, "in data."

(b) Allocation of Rights

(1)(iii) In the fifth line after the word "computer" add the word "software", and in the sixth line add an "s" to the word "program".

(c) Rights to SBIR data capitalize "rights" in the third line.

SBIR Rights Notice (XXX 1990)

Limited Rights Notice

(b)(2) insert the word "design" after the word "detailed." We also note that this subparagraph does not provide for agents of foreign governments or for release for informational purposes. (See Limited Rights Notice in clause 52.227-14). We believe it should.

(e) Restricted rights computer software. In the fourth line after the word "in", insert "or with."

Restricted Rights Notice

(2) First line after the word "in", insert the words "or with."

(f)(3) Removal of copyright notices.

In the second sentence after the word "any", add the word "authorized."

In the last sentence after the word "all", add the word "Government."

(g)(1) in the thirteenth line change the word "discovery" to read "delivery."

Technical Data Certification, Revision, and Withholding of Payment (XXX 1990)

(b)(3) in the next to the last sentence change "27.407-1" to read "27-407.2."

(c)(1) in the fifteenth line add the prefix "sub" to the word "paragraph."

Alternate I (XXX 1990).(c) in the sixth line, insert the words "is reached" after less,"

52.227-23 Rights to Proposal Data (XXX 1990) in the sixth line, delete the word "General."

52.227-24 Validation of technical data markings (statutory).

General: The two validation clauses in this section have different standards for retention of records: viz., "sufficient to reasonably justify the validity", and "adequate to justify the validity", respectively. We believe that the standards should be identical for both situations. In addition, the procedures for validation are different for the statutory and non-statutory data. We see no advantage to two different procedures and recommend that one process be used.

(c) In the eleventh line, delete the first word "If,"

(e) In the eighth line, change the word "section" to read "subparagraph."

52.227-28 Listing and Procedures for Subsequent Negotiation of Rights in Data (XXX 1990)

(3) It is recommended that a parenthetical reminder to include the negotiation schedule be inserted after "schedule;" in the fifth line.



DEPARTMENT OF THE TREASURY
WASHINGTON

31 JAN 1991

ASSISTANT SECRETARY

Dear Ms. Neilson:

These comments express our views concerning the advanced notice of proposed rulemaking FAR/DAR Case 90-438 on Federal Acquisition Regulation, Rights In Technical Data published in the Federal Register, October 15, 1990. In part the proposed rule would respond to section 1(b)(6) of Executive Order 12591, dated April 10, 1987. The Treasury Department, working through the Economic Policy Council, played a key role in the development of the Executive Order.

The Executive Order instructs agencies to make it easy for intellectual property rights developed with government support to be retained by contractors in order to encourage commercialization. We are concerned that the proposed rule is not clear under what circumstances contractors can retain data rights. For this reason alone the proposed rule should be redrafted.

Under 27.404-1, it appears that the government would obtain unlimited data rights whenever it is in the government's interest to obtain such rights. However, the government's interest is not clearly defined. This leaves too much discretion to contracting officers. In fact, for example, section 27.404-1(a)(1) provides that contractors must engage in a case-by-case petitioning of contracting officers for rights to data created in a contract. The system is vaguely described in 27.404-4(g), 27.405-1 and 27.405-2. It leaves wide discretion to contracting officers; they are likely to respond more to agency or contract interests rather than to broad national interest. Contracting officers generally are not in a position to recognize the benefits to the economy from permitting contractors to retain data rights. That is why the Executive Order states: "The head of each Executive department and agency shall, within overall funding allocations and to the extent permitted by law: . . . cooperate, under policy guidance provided by the Office of Federal Procurement Policy, with the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the government."

The intent of this is clear. The government should permit contractors to retain rights, subject to the government being able to use the data or have them used on its behalf royalty free. The proposed rule reverses this presumption and will require contractors to petition for use of the data. This is contrary to the Executive Order.

The Department of Defense annually sponsors over \$40 billion of research and development. In addition to its defense applications, the technical data arising from this large expenditure on R&D also should be used to increase the economic competitiveness of the nation. If the government retains unlimited rights to data when not needed for national security, the private sector will not make the investment needed to commercialize the results of the government supported R&D; this important resource will not advance our competitiveness if the government insists upon holding on to it.

We are also concerned about section 27.404-5. It states that contractors may not assert copyright protection for data and software developed in the performance of a contract if:

- "(iii) The data are of the type that the agency distributes to the public under an agency program to disseminate such information;
- (iv) The contracting officer determines that limitations on distribution of the data are in the national interest;
- (v) The contracting officer determines that the data should be disseminated without restriction."

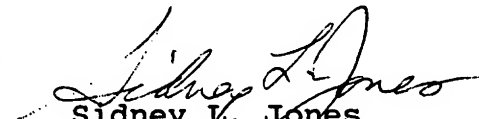
Placing technical data into the public domain may easily destroy its economic value. Once in the public domain, no one has title to it and hence it becomes unlikely that the investment will be made that is needed to further develop and commercialize the results of the government supported R&D. It is only through use in the commercial sector that technical data can contribute to our nation's economic efficiency and international competitiveness.

Under 52.227-14b(1) it appears that the government would retain unlimited rights not only to data developed during the course of a contract but also to already existing data owned by the contractor and used to perform the contract. Therefore, contractors might be required to deliver data on how to make something even if that data existed prior to the contract. If contractors are subjected to the risk that the contracting officers would require disclosure of trade secrets, we can be certain that the average of all bids will be raised to compensate for the risk; and the cost to the government will be raised accordingly.

By undertaking to retain data rights the government will raise the cost of contracts. If the government is successful, contractors in formulating their bids will not take into account the commercial value of technology developed in performance of the contract. The cost to the government of its contracts will be greater than needed because the government will have reduced the value of the contracts to contractors.

The Executive Order and the President's Technology Policy clearly intend that research and development conducted for programmatic purposes also be transferred to the private sector for commercialization except where there is a compelling reason to the contrary. For the reasons described above the proposed rule would do little to advance this policy. Contractors will be reluctant to commit private funds to commercialize technology if they cannot have clear title to the technology. The proposed rules should be withdrawn and rewritten to meet the above objectives. It is our understanding that the proposed rules were not prepared under policy guidance provided by the Office of Federal Procurement Policy as required by the Executive Order.

Sincerely,


Sidney V. Jones
Assistant Secretary
for Economic Policy

Ms. Linda W. Neilson
Procurement Analyst
ODASA (P)/DARS
c/o OUSD (A) (M&RS)
Room 3D139, Pentagon
Washington, D.C. 20301-3062

DEPARTMENT OF THE TREASURY
WASHINGTON
15TH & PENNSYLVANIA AVE, N.W.
WASHINGTON, DC 20220

FACSIMILE COVER SHEET
ECONOMIC POLICY

DATE 1/31/91

FAX MESSAGE NUMBER: _____

NUMBER OF PAGES TO FOLLOW: 3

TO: Linda W. Neilson

ADDRESSEE'S FAX NUMBER: 703-697-7266 9845

ADDRESSEE'S CONFIRMATION NUMBER: _____

FROM: Sidney L. Jones
202-566-2551

SENDER'S FAX NUMBERS: (202) 786-8452

SENDER'S CONFIRMATION NUMBER: (202) 566-~~XXXX~~2551

COMMENTS/SPECIAL INSTRUCTIONS:

UNCLASSIFIED



DEPARTMENT OF THE TREASURY
WASHINGTON

31 JAN 1991

ASSISTANT SECRETARY

Dear Ms. Neilson:

These comments express our views concerning the advanced notice of proposed rulemaking FAR/DAR Case 90-438 on Federal Acquisition Regulation, Rights In Technical Data published in the Federal Register, October 15, 1990. In part the proposed rule would respond to section 1(b)(6) of Executive Order 12591, dated April 10, 1987. The Treasury Department, working through the Economic Policy Council, played a key role in the development of the Executive Order.

The Executive Order instructs agencies to make it easy for intellectual property rights developed with government support to be retained by contractors in order to encourage commercialization. We are concerned that the proposed rule is not clear under what circumstances contractors can retain data rights. For this reason alone the proposed rule should be redrafted.

Under 27.404-1, it appears that the government would obtain unlimited data rights whenever it is in the government's interest to obtain such rights. However, the government's interest is not clearly defined. This leaves too much discretion to contracting officers. In fact, for example, section 27.404-1(a)(1) provides that contractors must engage in a case-by-case petitioning of contracting officers for rights to data created in a contract. The system is vaguely described in 27.404-4(g), 27.405-1 and 27.405-2. It leaves wide discretion to contracting officers; they are likely to respond more to agency or contract interests rather than to broad national interest. Contracting officers generally are not in a position to recognize the benefits to the economy from permitting contractors to retain data rights. That is why the Executive Order states: "The head of each Executive department and agency shall, within overall funding allocations and to the extent permitted by law: . . . cooperate, under policy guidance provided by the Office of Federal Procurement Policy, with the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the government."

The intent of this is clear. The government should permit contractors to retain rights, subject to the government being able to use the data or have them used on its behalf royalty free. The proposed rule reverses this presumption and will require contractors to petition for use of the data. This is contrary to the Executive Order.

The Department of Defense annually sponsors over \$40 billion of research and development. In addition to its defense applications, the technical data arising from this large expenditure on R&D also should be used to increase the economic competitiveness of the nation. If the government retains unlimited rights to data when not needed for national security, the private sector will not make the investment needed to commercialize the results of the government supported R&D; this important resource will not advance our competitiveness if the government insists upon holding on to it.

We are also concerned about section 27.404-5. It states that contractors may not assert copyright protection for data and software developed in the performance of a contract if:

- "(iii) The data are of the type that the agency distributes to the public under an agency program to disseminate such information;
- (iv) The contracting officer determines that limitations on distribution of the data are in the national interest;
- (v) The contracting officer determines that the data should be disseminated without restriction."

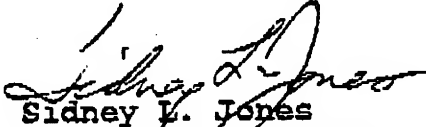
Placing technical data into the public domain may easily destroy its economic value. Once in the public domain, no one has title to it and hence it becomes unlikely that the investment will be made that is needed to further develop and commercialize the results of the government supported R&D. It is only through use in the commercial sector that technical data can contribute to our nation's economic efficiency and international competitiveness.

Under 52.227-14b(1) it appears that the government would retain unlimited rights not only to data developed during the course of a contract but also to already existing data owned by the contractor and used to perform the contract. Therefore, contractors might be required to deliver data on how to make something even if that data existed prior to the contract. If contractors are subjected to the risk that the contracting officers would require disclosure of trade secrets, we can be certain that the average of all bids will be raised to compensate for the risk; and the cost to the government will be raised accordingly.

By undertaking to retain data rights the government will raise the cost of contracts. If the government is successful, contractors in formulating their bids will not take into account the commercial value of technology developed in performance of the contract. The cost to the government of its contracts will be greater than needed because the government will have reduced the value of the contracts to contractors.

The Executive Order and the President's Technology Policy clearly intend that research and development conducted for programmatic purposes also be transferred to the private sector for commercialization except where there is a compelling reason to the contrary. For the reasons described above the proposed rule would do little to advance this policy. Contractors will be reluctant to commit private funds to commercialize technology if they cannot have clear title to the technology. The proposed rules should be withdrawn and rewritten to meet the above objectives. It is our understanding that the proposed rules were not prepared under policy guidance provided by the Office of Federal Procurement Policy as required by the Executive Order.

Sincerely,


Sidney L. Jones
Assistant Secretary
for Economic Policy

Ms. Linda W. Neilson
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Audit Policy
and Oversight

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

M

JAN 28 1991

MEMORANDUM FOR DEFENSE ACQUISITION REGULATORY COUNCIL

**SUBJECT: Defense Acquisition Regulation/Federal Acquisition
Regulation Case No. 90-438, "Rights in Technical Data"**

We have reviewed the advance notice of proposed rulemaking which would establish a Government-wide rule on technical data and replace the current Department of Defense (DoD) Federal Acquisition Regulation (FAR) Supplement Interim Rule in subpart 227.4 and the current FAR rule subpart 27.4. In general, we believe that the proposed changes represent a substantive improvement over the existing regulations. We are particularly pleased with the manner in which the revised language elevates the acquisition of technical data to a major concern during the contracting stage of a program. The level of detail in the proposed code revisions will have the effect of invoking a great many lower-level regulations and rules at the level of the contracting office.

We do, however, have some concerns and suggestions regarding the proposed regulations. Regulations for the acquisition of data rights must balance the needs of the government to obtain the information it legitimately needs to operate, maintain and perform quality assurance on a particular system with the concerns related to the property rights of corporations and individuals. We believe that certain clarifications are needed to help achieve that balance. Furthermore, we are concerned that interpretations of the currently proposed language may serve to limit the ability of the government to comply with the Competition in Contracting Act of 1984. Therefore, we submit the enclosed general and specific comments and recommendations to clarify and strengthen the rights in technical data.

We appreciate the opportunity to comment on the proposed rulemaking. Although not perfect, the language of the proposal would constitute a substantive improvement to the present FAR/Defense Acquisition Regulation. The revised regulations would also ease the burden of our auditors by providing firm criteria to use in evaluating the acquisition of technical data.

Michael R. Hill
Assistant Inspector General
for Audit Policy and Oversight

Enclosure

A. GENERAL COMMENTS

1. Cataloging and Logistics Support

We have encountered programs where the information contained in the provisioning data supplied by a contractor was insufficient to make correct decisions regarding cataloging or logistics support. At one point on the AOE-6 ship acquisition, for example, the provisioning process was delayed by the poor quality of technical information given to the Navy by the prime contractor. If it had been clear at the time the contract was written what level of technical data detail the Navy expected the prime contractor to provide, then subsequent schedule delays might have been avoided.

The effects of inadequate technical data are felt throughout the logistics life cycle. Decisions may be made during cataloging to individual stock spare parts which already exist elsewhere in the supply system. The consequences are higher spare parts cost and a lack of parts standardization.

Furthermore, the decision on how to classify an item for logistics support purposes is directly affected by the amount of technical information obtained through the acquisition of data rights. While the natural desire is to only procure as much information as the Government needs, it must also be recognized that the largest component of life-cycle costs is encountered in the logistics support phase. An example of the types of decisions made on the basis of technical information include classification decisions as to whether an item should be consumable or repairable.

We have encountered a number of programs where delays in provisioning spare parts have had an impact on the delivery date of the weapon system. The delays have been due to problems in speedily reviewing provisioning technical data, and among the reasons have been insufficient amounts of information.

2. Software Support

While cataloging decisions are not a major part of software acquisition, experience has shown that the logistics aspect of software acquisition is an overlooked component of software procurement, an example of which was shown on the C-17 program. Statistics published by the Electronics Industry Association show that some 70 percent of software life cycle costs are incurred in supporting and changing existing software. The eventual need of all software for changes is one that must be recognized in the acquisition community.

A particular problem with support software is its visibility. Our concern is that, in order to protect the legitimate intellectual property rights of vendors, the Government may give away the right to access the information needed to support systems in the future.

Enclosure

Such support software includes operating systems, language translators, program editors, test plans, test tools, program linkers, design tools, program description documentation, diagnostic software, users manuals, development tools, program design documents, system simulators, flow charts, and interface documents. All of these items can be necessary in order to maintain software.

3. Competition in Contracting

We are concerned that the language in both the present regulations governing technical data rights and in the proposed language do not clarify the need of the Government to comply with the Competition in Contracting Act of 1984. The language in the U.S. Code pertaining to that law in Section 10 USC 2304 (a)(1)(A) requires the head of an agency to obtain full and open competition. The law further provides for the Secretary of Defense to specifically contract for technical data over and above the information that relates to form, fit, function or that which is necessary for operation, maintenance, installation or training (10 USC 2320). Unless there is some specific language in the instruction on the use of technical data rights, contractors may claim that data furnished for form, fit, function or support considerations has been used to solicit competition for follow-on procurement, when that is perfectly legitimate according to the U.S. Code.

Accordingly, we suggest additional language be added to clarify this confusion.

B. SPECIFIC COMMENTS

1. Definition of Software

We are concerned that the definition of software may unintentionally exclude material needed to perform maintenance on programs. Accordingly, we recommend the following changes to the definitions in the proposal.

Original language:

27.401 Definitions

Computer Software, as used in this subpart, means:

(1) Computer programs which are data comprising a series of instructions, rules routines and statements which allow or cause the computer to execute an operation or series of operations; and

(2) Data comprising source code listings, design detail algorithms, flow charts, formulae, and related material that would enable the computer program to be produced, created or complied.

Suggested change:

27.401 Definitions

Computer Software, as used in this subpart, means:

(1) Computer programs which are data comprising a series of instructions, rules routines and statements which allow or cause the computer to execute an operation or series of operations; and

(2) Data comprising source code listings, design detail algorithms, flow charts, formulae, and related material that would enable the computer program to be produced, created or compiled. Also included is any data or information legitimately needed for software operation, software quality assurance, and software maintenance. Such information may include operating systems, language translators, program editors, test plans, test tools, program linkers, design tools, program description documentation, diagnostic software, users manuals, development tools, program design documents, system simulators, flow charts, and interface documents.

Such a change will codify the notion that source code listings are not the only items needed for software operation, quality assurance and maintenance.

2. Contract Proposal Evaluation Criteria

We also have a problem with the evaluation criteria allowed for qualifying contractors. The proposed language for the notification section says:

27.405-1 Notification and Negotiation Procedures.
(e) (3)

The information provided by the offeror may also be used in the source selection process (e.g., life cycle cost analysis). However, in no event may an offer be found unacceptable for purposes of contract award solely because the offeror refuses to sell or otherwise relinquish to the Government rights in technical data to which the offeror is otherwise entitled under applicable law or regulation.

The language in this section might be construed as limiting the ability of a contracting office to select a potential contractor on the basis of maintainability of software. If one vendor is offering a software product with unlimited data rights and another is offering restricted rights and there is a legitimate need for software maintenance, then the program office should be able to select a vendor who provides the greater maintainability of the product. For that reason, we suggest the following revision:

27.405-1 Notification and Negotiation Procedures.
(e) (3)

The information provided by the offeror may also be used in the source selection process (e.g., life cycle cost analysis). However, in no event may an offer be found unacceptable for purposes of contract award solely because the offeror refuses to sell or otherwise relinquish to the Government rights in technical data to which the offeror is otherwise entitled under applicable law or regulation, unless the acquisition of data rights affect the maintainability of the delivered product and there is a legitimate need for maintainability on the part of the Government.

The objective is to re-state the principle that data rights should never be acquired except to serve some specific purpose.

3. Technical Data Used to Compete Follow-on Contracts

Our concerns about clarification of data rights solicited for other purposes but used to promote competition can be addressed with the following language change. We suggest that an additional section be added under, 27.404-1 Unlimited rights data:

(vi) All technical data needed to comply with the provisions of the Competition in Contracting Act of 1984 as codified in 10 USC 2304 (a). Such technical data is that which is over and above the data obtained under sections 27.404-1 (a)(1) consisting of form, fit and function data and that needed to operate, install, maintain or repair any item.

While the exact placing of the language in the regulation is open to question, we believe the establishment of some linkage to 10 USC 2304 and 10 USC 2310 is necessary in order to define technical data over which the government retains unlimited data rights and which can be released in future competitive solicitations.

4. Identification of Government Purpose Rights

Subsection 27.405-2 Negotiation of Government purpose rights has a subsection which says:

(1) Efforts should be made to separate items, components, processes, or software to the lowest practical identifiable level, so that the Government purpose rights will not be applied unnecessarily to items, components, processes, or computer software, developed exclusively at private expense or exclusively at Government expense.

While the goal of knowing requirements early is laudable, the development process used by the Department of Defense makes this comment largely meaningless. System specifications-the highest level requirements are defined during the Demonstration/Validation phase. More detailed requirements are often not defined until well into Full-Scale development.

We suggest the following change:

(1) While every effort should be made to separate items, components, processes, or software to the lowest practical identifiable level as early in the development process as possible, this goal is frequently unachievable. The contracts containing data rights clauses should reflect the need for flexibility, identifying data needs when they become known. The objective is that the Government purpose rights will not be applied unnecessarily to items, components, processes, or computer software, developed exclusively at private expense or exclusively at Government expense.

We realize that the need for additional data is covered under the language in Section 27.408(b) Additional Data Ordering, but we believe that it is unrealistic to expect that on many contracts the data rights needs will be known early in the program. The addition of Section 27.408(b)(2) which allows additional data be provided within 3 years after the acceptance of all items within the contract, is particularly welcome.

5. Improvements to DFAR Section 52.227-21 Technical Data Certification, Revision and Withholding of Payment

We believe that the language in DFAR 52.227-21 in general represents a much-needed improvement in the definition of responsibility between the contractor and the Government/Certifying Official. Nevertheless, there are a number of problems and suggested changes that we would note.

(a) This clause shall apply to all technical data that have been specified in this contract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during contract performance or within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth herein....

We assume that the technical data referred to in the beginning of the paragraph is overall technical data on the program, whereas the "other than technical data" referred to in the parentheses are technical data for research and development. The wording should be changed to make this clear.

Since the Department of Defense has both a regulation governing the conduct of the Technical Data Reviews, DoDI 5010.12 DoD Technical Data Management Program and a MIL-Handbook, both should be cited as governing the reviews. We suggest a revision along the lines of:

(2) Data delivered under this contract shall be subject to reviews such as those required by DoD Instruction 5010.12, DoD Technical Data Management Program and by MIL-Handbook 288, Review and Acceptance of Engineering Drawing Packages, during preparation and prior to acceptance. Data are also subject to review(s) by the Government subsequent to acceptance. Such review(s) may be conducted ancillary to other reviews such as in-process reviews of configuration audit reviews.

We wish to commend the straightforward wording of subsection (3). Wording requiring correction of technical data on the part of the contractor represents a real improvement on the existing language.

N



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Ms. Linda W. Neilson
Procurement Analyst, ODASD(P) / DARS
c/o OUSD(A)(M&RS), Rm. 3D139
The Pentagon
Washington, DC 20301-3062

Dear Ms. Neilson,

We are providing comments on your Advance Notice of Proposed Rulemaking for the proposed FAR Subpart 27.4 - Right in Data and Copyrights (FAR/DAR Case 90-438).

We have been engaged in a DoD sponsored task on Software Reuse. Our focus on the proposed Subpart 27.4 has been taken from that perspective. We have included a synopsis of our tasking to aid in your understanding of the context of our comments.

In addition to our specific comments, we have provided some details from our report. Since it has not yet been formally accepted (remains a Draft), we are unable to provide you a copy but will do so as soon as permitted.

We would like to continue dialogue on this important subject and would welcome the opportunity to assist in any way in the actual final drafting of an interim rule.

We hope our comments are useful to you, offer our congratulations for the fine work to date and our thanks for the opportunity to participate in the process through the Public Hearings.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert J. Bowes", written over a horizontal line.

Robert J. Bowes

Atchs:

1. Tasking Synopsis
2. Comments
3. Report Extraction

TASKING SYNOPSIS

Reusable Software Acquisition Environment (DSD Laboratories)

The purpose of this task is : To investigate and identify current business impediments to the reuse of software; and to enhance software reusability through the establishment of a framework for industry incentives to commercialize reusable software packages. Two major areas have been identified for study:

Area 1: Incentives must be established to reward contractors who engineer reusability into their software development lifecycle. This will require the identification and modification of any regulation, policy or procedure which impedes the establishment of such incentives. These incentives could take the form of specific, increased funding to contractors incorporating reusability into their software development efforts.

- The Federal Acquisition Regulation (FAR) and the DoD FAR Supplement as well as service supplements will be examined for impediments in the way data rights are acquired and software is contracted.
- Budgeting and program financing regulations and policies will be reviewed to identify unnecessary restrictions and/or disincentives to providing financial resources for engineering software reusability.
- Procedures and processes for providing program directions and acquisition strategy guidance will be examined for opportunities to emphasize and institutionalize the concept of engineered software reusability. Techniques such as license rights to developing contractors; cataloging of software products across functional lines (by industry or government); and other business incentives and processes to stimulate commercial custodianship and marketing of reusable software packages will be identified, critiqued, legitimized and presented in the proper regulatory or procedural framework for DoD implementation. Ease of use will be the basis for any methodology developed.

Area 2: Examine the feasibility and utility of applying the techniques listed above on an "across the board" versus selective basis. Reusability effectiveness may, for instance, be most promising across a given functional area (e.g. Command and Control), but only when programs exceed thresholds in terms of program value, anticipated length of software development cycle or other significant parameters. We will insure that our recommendations are based on assessments from all functional areas within the development, acquisition and using communities.

After an initial effectiveness screening, those concepts and issues meriting further study will be processed within the framework described in the two major study areas.

GENERAL COMMENTS

- (1) The proposed Subpart 27.4 continues to maintain combined coverage for both technical data and software. At the November 19, 1990 Public Hearing on the Advance Notice, the Council stated this combined coverage was retained because it believed there were more similarities than differences between Technical Data and Software. We maintain the existence of differences is precisely why the topics must be treated separately. Software deals in restricted, not limited rights. Software copyright issues, especially with regard to software reuse, are conceptually and fundamentally different from those for Technical Data. Continuing to combine the topics unnecessarily complicates and confuses issues. If the council publicly (Federal Register) expressed its intent to separate the topics, we would be happy to participate in the rewrite. We do not have the resources to engage in this substantial effort without knowing it would reach fruition.
- (2) Subpart 27.4 remains poorly organized and is written for those with a legal background. The basic rights in data clause (notice no software mentioned in the title) (52.227-14) is a classic example. It rambles for pages, loosing the reader in its depth and breadth. We recommend the council follow the insurance industry which was forced to rewrite its policies so a layman could have more potential for understanding the scope of coverage being provided and the specific exclusions which applied. A good example of a separate software rights clause can be found in the Software Engineering Institute (SEI) Technical Report CMU/SEI-86-TR-2 (Sept., 1986). In fact, the SEI has several other reports on software which the council should examine, including CMU/SEI-86-TR-1 (April, 1986) and CMU/SEI-87-TR-2 (January, 1987). We note the Unified Industrial Association also made reference to the SEI reports at the January 11, 1991 Public Hearing on the Advanced Notice. It appears to us little has been done to examine the SEI's work in the area of software rights.

SPECIFIC COMMENTS

- (1) Use of the term "Developed and Necessary". We see no difference in the intent and effect of this term as used in 52.227-14 (b)(1)(i)(B) and the current term "Required for Performance". In both cases, a contractor's initiative in funding development of a product is crushed by the Government's insistence that unlimited data or software rights pass to the Government. We recognize and support the need for the Government to maintain its systems. A more workable alternative than presented in 111.A of the Advance Notice overview would be to allow the contractor to retain all rights, including copyright, for the duration of the contract or a minimum of 5 years. After 5 years, Government purpose rights could become effective with the contractor retaining copyright (license for Government use to be negotiated). This would allow the contractor to establish a commercial position and be rewarded for its investment. The contractor would also retain a potential advantage in future competitive or non-competitive Government business. We believe this is also reasonable in exchange for a firm's initiative and risk exposure in making the private development investment. Should national security or other impelling interests dictate the need for greater rights, license arrangements could be structured to at least provide the contractor with recovery of its initial investment plus a reasonable profit (royalty) for lost opportunities. Unless the Government accepts a more reasonable policy on privately funded development, the contentions between it and industry will continue. More importantly, industry will no longer provide its resources to initiate development without at least a clear commercial opportunity. Finally, since this restrictive language would now apply to all federal agencies (not just DoD), the Government at large will certainly see less technologically innovative solutions and more old technology approaches, leaving it with continuing and growing problems in system supportability.
- (2) The proposed FAR Part 27.4, Subpart 27.406(c) does incorporate the more straightforward FAR approach to defining commercial software and providing more appropriate clause coverage (52.227-19). Unfortunately, it also allows Government personnel to revert to the basic Rights in Data clause by itself or in concert with 52.227-19. We expect the conservative acquisition professional will do just that, and continue to create unnecessary confusion and contention with commercial software vendors.

Subpart 27.406(c) should be changed to state that a commercial software license will always be acceptable, unless it can be factually demonstrated to be inconsistent with the Government's minimum needs as specified in the restricted rights definition.

- (3) The proposed FAR Part 27.4 does not clearly describe the contractor's and Government's rights with respect to unpublished software existing at contract award.

The proposed revision should be altered to explicitly state that existing, unpublished software is restricted rights software unless the Government acquires greater rights through licensing or acquisition.

- (4) The NASA approach to encouraging commercialization has been adopted through the GPR description in the proposed FAR, Part 27 revision. Under GPR, the Government obtains a license for use and disclosure relating to Government purposes, providing the contractor's limited, exclusive commercial rights are protected. Unfortunately, while this change improves the coverage, the Part 27 revision does not promote GPR over unlimited rights. The positive policy statements in Subpart 27.402 are negated by the ineffective implementation guidance in 27.404.

While the Government's intentions are good, the proposed new policy statements do not encourage commercialization objectives found in GPR over obtaining unlimited rights. Unless 27.404-1 is changed to explicitly favor GPR over unlimited rights, Government acquisition personnel will continue to pursue full rights, and provide disincentives to industry to invest (mixed funding) or participate at all. We recommend that 27.404-1 be changed to explicitly favor GPR over unlimited rights.

- (5) Subpart 27.402(c) clearly directs the Government to consider not only shared funding, but also its ultimate requirements before determining appropriate rights to be acquired.

We believe Subpart 27.404 should contain a reference back to 27.402 to assure that rights issues will be properly considered where mixed funding occurs, and that GPR will be stated as the most stringent Government rights possible under such a scenario. Furthermore, the contractor should always be allowed to claim a copyright in mixed-funding situations.

- (6) The current DFARS and FAR automatically allow the contractor to claim a copyright, even when the Government has paid for development. A simple discussion of why copyrights are important is lacking in the DFARS.

The Current FAR 27.404(f)(1)(i) is somewhat better (but not by much) in describing how the contractor is normally granted a copyright to enhance dissemination of information produced at Government expense (i.e., commercialize). The proposed FAR, Part 27.4 revision is a further improvement, but still requires enhancement of the implementing guidance. The current NASA FAR supplement requires proactive Government team involvement (including patent or intellectual property counsel) in determining whether a contractor has specific commercial plans, and has made or will make a significant financial contribution to the development or maintenance of the software. The proposed FAR, Part 27 should incorporate more of the NASA supplement language. For now, the copyright issue is most readily solved by not invoking today's Special Works clause when the contractor demonstrates a commitment to commercialization. This will, at least, give the contractor full commercial rights.

(7) Copyrights

- (a) While the DFARS copyright license includes the right to distribute copies to the public, the FAR does not, unless what is known as the Special Works clause is used.

The proposed FAR, Part 27 revision adopts the current FAR approach, which encourages commercialization. The final Part 27 must retain this feature.

- (b) The FAR approach, which is more favorable to industry regarding commercial exclusivity has been adopted in the proposed FAR, Part 27 revision. However, copyrights, like unlimited rights and GPR, do allow full disclosure for Government purposes. Therefore, the contractor's incentive to partially fund creation of reusable software, or to put its best talent on totally government-funded software projects remains inhibited, since the current structure doesn't enable the contractor to benefit from Government-sponsored reuse of its products.

Consequently, a policy change which would prevent Government disclosure for a stated period should be considered. Our comment (1) addresses this issue.

REPORT EXTRACTION

Analysis of Advanced Notice of Rulemaking for FAR, Part 27 and Proposed Changes

The proposed regulatory change to the Federal Acquisition Regulation (FAR): Rights in Technical Data - Advanced Notice of Proposed Rulemaking, Federal Register, Vol. 55, No.199, 15 October 1990 proposes to replace the current DFARS 227.4 (Interim Rule, 1988) and FAR 27.4 with a single regulation for all Government agencies addressing rights in technical data and computer software. We attended the November 19, 1990 and January 11, 1991 public hearings on this advanced notice.

By presenting the regulatory change as an advanced notice, the Government has essentially acknowledged the potential for extensive comment and subsequent rewrite prior to publishing the change as an Interim Rule. While comments are accepted on Interim Rules, historically the final product has been essentially the same as the published Interim Rule. The FAR Council has not provided a timeline for publishing an Interim Rule. We anticipate that it will be at least 12 months from the October 1990 Federal Register Notice.

There are some significant changes in the advanced notice. We will continue to focus on the impact on software reuse of these changes and any other proposed modifications.

In combining DFARS 227.4 and FAR 27.4, the Federal Government has taken a giant step forward. Now, a single regulation will exist which addresses the Government's and contractor's rights regarding data and software. We thus immediately eliminate present inconsistencies between the documents. However, the controversies are not totally eliminated. In the following sections, we will review the more important issues, commenting on whether any improvements have occurred with respect to reuse.

Data and Software Continue to be Treated Together

During the 19 November 1990 public hearing, the Government stated that its decision to maintain combined coverage resulted from the conclusion that there were more similarities than differences in the topics. However, we continue to maintain that the existence of differences provides sufficient justification to separate treatment of software and data. Continuing to combine the topics unnecessarily complicates and confuses issues. As an example, Subpart 27.4 continues to be titled Rights in Data and Copyrights with no mention of software. Additionally, sections 27.402, 403 and 404 either initially address only data or only include "Data" in the title of the section. Finally, the phrase "developed and necessary" for performance is replacing the controversial term "required for performance". When the phrase is used in 27.404-1 (a)(1)(i)(B), it initially refers to data and software, but then reverts only to use of the term "data". When the phrase is used in 52.227-14, subparagraph (b)(1)(i)(B), the terms software and data are only used once, and do not create the potential confusion of whether the Government intentionally or unintentionally omitted software in the second reference in 27.404-1(a)(1)(i)(B). These examples reinforce our belief that as long as the topics are addressed together,

software will not receive proper treatment. A higher degree of sophistication regarding how software must be viewed, with respect to Government rights and industry intellectual property interests is required. Additionally, a more focused discussion of critical software issues, provided in a more readable style is still necessary.

Introduction of Government Purpose Rights (GPR)

The NASA approach to encouraging commercialization has been adopted in GPR. Under these circumstances, the contractor is allowed to retain exclusive commercial rights for a negotiated period of time, after which the software or data reverts to unlimited rights. The significance of this approach is that the contractor is provided with commercial protection in both mixed funding and 100% Government funding situations when it can demonstrate an intention to commercialize - a very different and progressive change from the current DFARS. Under GPR, the Government obtains a license for use and disclosure relating to Government purposes, providing the contractor's limited, exclusive commercial rights are protected. Is the coverage better? Yes. Is it as good as it could be? No.

The DAR Council's Deputy Director, Ms. Linda Greene is quoted in the 15 October 1990 issue of the Federal Contracts Report (Vol.54, No. 15, page 549) as saying "The draft rule also establishes more of a preference for Government purpose rights [than unlimited rights] than is present under the [1988] Interim Rule. We think we've made a gigantic stride there." Unfortunately, while the coverage has improved, the advanced notice does not emphasize GPR over unlimited rights. Examining Subpart 27.404-1, unlimited rights, and 27.404-4, GPR, reveals that the Government's stated policy is still to acquire unlimited rights unless the contract specifies GPR or copyrights. So, while intentions are good, policy statements do not promote commercialization objectives found in GPR over obtaining unlimited rights. Unless 27.404-1 is changed to explicitly favor GPR over unlimited rights, government acquisition personnel will continue to pursue full rights and provide disincentives to industry to invest (mixed funding) or participate at all. Software reuse is not incentivized by the advanced notice policy language, even though GPR has provided a vehicle to protect commercial rights. The positive policy statements in subpart 27.402 are negated by the ineffective implementation guidance in 27.404.

Copyrights

The FAR approach, which is more favorable to industry regarding commercial exclusivity, has been adopted in the advanced notice. The Government's copyright for software does not include the right to distribute copies to the public as is now found in DFARS. This should help promote reuse, since a contractor will now be assured that its full commercial rights are protected. A more proactive Government approach (similar again to NASA) has been taken regarding the decision process governing the granting of contractors' copyrights. The coverage has also been improved by providing a more complete explanation of why copyrights are important (commercialization). However, copyrights, like unlimited rights and GPR, do allow full disclosure for Government purposes. Therefore, the contractor's incentive to partially fund creation of reusable

software, or to put its best talent on totally Government-funded software projects remains inhibited, since the current structure doesn't enable the contractor to benefit from Government-sponsored reuse of its products.

The issues we've identified regarding the copyrighting of derivative works are not dispelled by the advanced notice coverage in Subpart 27.404-5 and its associated clauses.

The issue concerning use of the current DFARS Special Works clause is now covered in Subpart 27.406 and its associated clause in 52.227-17. We see no appreciable change beyond a statement regarding inapplicability to "Limited Rights Data or Restricted Rights - Software". This reference is not clear, and we maintain that copyright issues under 27.406 will continue to impact the DoD contractor community.

Commercial Software

Subpart 27.406(c) does incorporate the FAR approach to defining commercial software and providing more appropriate clause coverage (52.227-19). Unfortunately, it also allows government personnel to revert to the basic Rights in Data clause by itself or in concert with 52.227-19. We expect the conservative acquisition professional will do just that, and continue to create unnecessary confusion and contention with commercial software vendors. The guidance also negatively impacts commercial software licenses by noting that the intent of 52.227-19 is to supersede any portions of those licenses that are inconsistent with Government restricted rights needs. This should be changed to state that a commercial software license will always be acceptable, unless it can be factually demonstrated to be inconsistent with the Government's minimum needs as found in the restricted rights definition. Without this type of change, commercial vendors, especially the small and innovative ones, will continue to avoid Government business because they will perceive the Government as an unfriendly and threatening (loss of proprietary interests) customer. Once again, the opportunity for reuse enhancement is potentially lessened by what will be perceived as a negative approach.

On balance, the revised coverage of the FAR is superior to that currently found in DFARS.

Mixed Funding

We noted that the DFARS only addresses mixed funding in the context of technical data. Subpart 27.402(c) of the advanced notice corrects this situation, also addressing computer software. It clearly directs the Government to consider not only shared funding, but also its ultimate requirements before determining appropriate rights to be acquired. It further directs the rights issue to be addressed at the lowest possible level of software identification. This should help focus issues on particular modules or components and narrow contentious areas. We believe Subpart 27.404 should contain a reference back to 27.402 to assure that rights issues will be properly considered where mixed funding occurs, and that GPR will be stated as the most stringent Government rights possible under such a scenario. Furthermore, the contractor should always be allowed to claim

a copyright in mixed-funding situations.

"Required for Performance"

This term has been deleted. The advanced notice now makes reference to the concept of "developed and necessary" for performance (52.227-14(b)(1)(i)(B)) when identifying situations where the Government must obtain unlimited rights. The advanced notice states a belief that this change has narrowed the application of the concept, but we do not agree. We see no change of any significance in the new 52.227-14 (b)(1)(i)(B), when compared to DFARS 227.471 and 252.227-7013 language. Since the advanced notice gives no further explanation or example to clarify how this "narrowing" has occurred, we suspect there is more show than substance in the claim. Another concern of even greater importance is the fact that the offensive DFARS language is now proposed for use throughout the Federal Government. Without deletion or radical modification, all federal agencies will now face the same contention existing today between industry and the DoD.

This "required for performance" issue continues to be the most significant potential impediment to software reuse. Industry will not provide its own products or use its best talent when faced with loss of its competitive position within the commercial and Government markets. While the Government can foster reuse through its own funding for new software, it continues to lose potential reuse opportunities derived from use of industry-funded software.

The concept should be changed to allow for more favorable industry treatment. A change in wording which would allow contractors to retain rights for the duration of the contract (or a minimum of 5 years) might be sufficient to overcome this impediment. We will continue to explore this potential solution.

Conclusion

We have addressed the most significant potential changes for software reuse in the advanced notice of rulemaking. Overall, it is a more understandable treatment of rights in data and software, though the basic Rights in Data clause remains horrific in its length and treatment of a multitude of issues.

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January 31, 1991

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Re: FAR/DAR Case No. 90-438.

Dear Ms. Neilson:

Fenwick & West represents a significant number of vendors of commercial software products (defined as commercial computer software and technical data associated with that software, i.e. manuals and instructional materials) that have great interest in the regulations applicable to transfers of commercial software products to the Government. Accordingly, we wish to comment on the proposed rules published in the Federal Register on October 15, 1990 that are intended to replace the parallel data rights provisions now found in the Federal Acquisition Regulations and the Defense Federal Acquisition Regulations Supplement.

As will be set forth in greater detail below we strongly urge that the proposed regulations be revised to reflect the following:

1. The Government's acquisition of manuals and instructional materials that accompany commercial computer software will be with the same restricted rights applicable to the commercial computer software;
2. The regulations will clearly and unambiguously set forth provisions establishing the legal effect of affixing only a copyright notice to commercial software;
3. Commercial software products which bear normal copyright and commercial markings will be licensed by the Government with no more than restricted rights, whether or not such commercial products are identified in the contract or marked in accordance with Government regulations;
4. The Government's ability to disclose all or part of a commercial software product will be limited to those instances where such disclosure is absolutely necessary to meet an identified Governmental purpose;

5. In all instances where the Government must acquire the right to disclose commercial software products, the Government will accept the initial responsibility of providing the contractor with written notice of both the identity of the third party that will have access to that contractor's proprietary data and a description of what commercial data will be disclosed to that third party; and
6. Commercial computer software and related technical data will be acquired via simplified procedures that include the following restrictions: (1) the Government will not use Government specified designs or Government unique specifications; (2) the Government will minimize the acquisition of technical data and rights therein; (3) the Government will acquire commercial warranties; (4) the Government will accept commercial markings and packaging practices; and (5) the Government will not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order.

I. INTRODUCTION.

We believe that the proposal to unify Government regulations for the acquisition of technical data by all Government agencies is a positive step. Vendors who provide commercial software products to the Government will be required to learn and comply with the requirements of only one regulatory scheme, rather than two, and will no longer risk losing proprietary rights as a result of inadvertent compliance with the wrong regulations. We also commend the Government's formal recognition of "segregability." Vendors who make modifications to their commercial software products will no longer fear having to battle to protect key portions of their pre-existing commercial products simply because they made substantial modifications in order to meet the Government's needs.

We further believe, however, that proposed regulations continue to represent a trap for unwary vendors of commercial software products. The regulatory scheme continues to accord the Government unlimited rights in commercial computer software and technical data unless the vendor carefully complies with complicated and ambiguous regulations. As a result, vendors of commercial software products can be surprised unfairly by the loss of all proprietary rights as a result of mere delivery of their product to the Government.

The purpose of these comments is to advocate for the clarification and reconsideration of the proposed regulations and urge alternative approaches to certain aspects of those regulations that could have particularly onerous consequences for vendors of commercial software products. Those areas concern the following: (1) the scope of rights transferred in commercial technical data sold as manuals and instructional materials; (2) the effect of affixing a copyright notice to technical data and computer software; (3) the requirement for the Government's restrictive markings on commercial data identifying the rights being transferred to the Government; (4) the disclosure of

proprietary information to a vendor's competitors; and (5) the Government need to adopt simplified procedures when acquiring commercial software products.

II. MANUALS AND INSTRUCTIONAL MATERIALS.

Sections 27.404-1(a)(1) and 52.227-14 provide for transfer to the Government of unlimited rights in "manuals and instructional materials furnished or required to be furnished for the installation, operation, maintenance and repair, or training with respect to any item, component, process, or for the installation, maintenance, operation and training with respect to any computer software, that are required to be, or in fact [are], delivered or furnished for use in the performance of [a] contract."

The proposed regulations further provide that the Government receives unlimited rights "unless provided otherwise for copyrighted data, as discussed in 27.404-5, or unless such data are agreed to be subject to Government purpose rights, as discussed in 27.404-4." However, the "copyright rights" applicable to pre-existing copyrighted technical data (discussed in greater detail in Section III, below) are at least equivalent in scope to unlimited rights, and "Government purpose rights" revert to unlimited rights after the passage of an agreed upon time.

Vendors of commercial software products typically exercise great care to protect their proprietary rights in manuals and instructional materials. These materials often contain important and detailed information and examples about the functions, architecture, and operation of the computer programs which they accompany. Commercial vendors protect this material under federal copyright and state trade secret law. Unrestricted disclosure of this type of information assists third parties in developing functionally equivalent, competitive products and results in the vendor's loss of trade secret protection. The transfer of manuals and instructional materials to the Government with unlimited rights, or any other class of rights equivalent in scope, necessarily results in unrestricted publication of their contents and the loss of the trade secret protections that are otherwise available in the commercial marketplace.

Under the current regulatory scheme, the Government receives only restricted rights in those manuals and instructional materials that accompany commercial computer software that is also transferred to the Government with restricted rights. The final regulations should preserve this result.

III. COPYRIGHT RIGHTS.

With respect to the use of a copyright notice on commercial software products licensed by the Government, the proposed regulations illustrate the phrase "what one hand giveth, the other hand taketh away." Sections 27.401-1(a)(1) and 52.227-14(b)(1) suggest that copyrighted data may be transferred to the Government with rights other than unlimited rights and direct the reader to Sections 27.404-5 and 52.227-14(c),

respectively. The cross-referenced sections specify the exclusive rights of an author of copyrighted data and acknowledge that they apply "to all data delivered to the Government with a copyright notice."

The cross-referenced sections go on, however, to prohibit the delivery of copyrighted commercial software products to the Government without the prior written permission of the contracting officer unless the commercial software product is identified as such in the contract. If the requisite permission is obtained, the computer software component (which constitutes "restricted rights computer software") is licensed to the Government with restricted rights while the related technical data (which constitutes "limited right technical data" under the proposed regulations) is licensed to the Government with "a paid-up, nonexclusive, irrevocable, or worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by and on behalf of the Government." Absent permission from the Contracting Officer to provide a copyrighted software product, however, copyrighted commercial software products are apparently transferred with broader rights.

A second problem involves the additional procedures which the proposed regulations require of commercial software product vendors. Section 27.404-3 sets forth these additional procedures for the transfer of commercial software products to the Government. Among these procedures are the requirements that the contractor provide the contractor with written notice and properly mark the commercial software products as required by the Government. It would appear therefore that affixing a copyright notice to commercial software products delivered to the Government is of no avail to the vendor absent compliance with the additional requirements.

The Government's desire to license a commercial software product should not, however, obligate the vendor of that commercial product to unnecessarily restate its rights in and to that product. The Government should license that product as if it were another commercial user.

A third problem for commercial vendors is posed by Section 27.404-3(b)(6) and the Restricted Rights Notice set forth in Clause 52.227-14(b)(3). These provisions establish that commercial software products bearing a copyright notice are considered published and are licensed to the Government without disclosure prohibitions (unless the further notice "Unpublished--rights reserved under the copyright laws of the United States" also appears).

Although it is no longer required by law, vendors of commercial software products routinely place copyright notices on their products. Such vendors are not prepared, however, for the delivery of those copyrighted products with unlimited rights or without restrictions on further publication. Some vendors of commercial software products have sufficient financial resources, do a sufficient volume of business with the Government so that they are aware of the importance of learning and complying with the intricacies of the

applicable regulations, or simply choose to absorb the additional costs of affixing the Government's notices to their products. Others, however, mistakenly believe that they can do business with the Government on the same terms they use with their other customers. Vendors that attempt to do so unwittingly transfer unlimited rights in their commercial software products to the Government. Still another group of vendors regards the complicated regulations as a serious disincentive for conducting business with the Government thereby potentially depriving the Government marketplace from the functional and competitive benefits afforded by such commercial products.

The consequence of placing a copyright notice on both the computer software and technical data components of a commercial software products must be simplified and clarified. We believe, however, that in no event should the presence of only a copyright notice on commercial software products create a presumption that the Government receives rights in the commercial software product broader than those rights received by a standard commercial purchaser or obligate that commercial software product vendor to: (i) identify the product in the agreement; (ii) provide special notice to the Government; (iii) or apply special markings in order to protect their rights. With respect to commercial software products, we further believe that the burden of establishing entitlement to more than restricted rights should rest with the Government.

IV. MARKING REQUIREMENTS.

We respectfully suggest that the Government focus on the market realities related to the broader software market and not only on commercial application software products used to operate personal computers. As set forth in Section III, above, the proposed regulations suggest that vendors of commercial software products may not rely on commercial markings to result in a transfer of restricted rights. Consequently, such vendors must include additional limited and restricted rights markings on their products. By contrast, the existing FAR provides that, when software is delivered to the Government with normal commercial markings, including a copyright notice, a transfer of restricted rights results.

In other instances, however, the commercial software used to operate common equipment like telephones, photocopiers, facsimile machines, cameras, and calculators, is both commercial and licensed from a third-party licensor. As a practical matter, it is virtually impossible for a vendor to mark the product in a manner that complies with the Government's regulations, especially if the media on which the computer programming is stored is not readily accessible by humans. Moreover, since much of the computer programming for these products comes from third-party licensors who, under the terms of the OEM agreement, are prohibited from using any restrictive markings other than the copyright notice, the additional marking requirements unnecessarily complicate the acquisition process and represent a clear threat to the rights of third-party suppliers.

We strongly advocate the retention and clarification of the existing FAR policy. Delivered computer software products, which otherwise meet the definition of restricted rights computer software products and which bear normal commercial markings, should be transferred to the Government with restricted rights only. A copyright notice should be adequate to provide the Government all rights necessary to meet legitimate commercial-type needs. If those rights are insufficient, the Government should not consider itself to be purchasing a "commercial product" and should not receive a "commercial price." It will, in fact, be demanding (and receiving) an enhanced non-commercial version of a commercial product.

V. DISCLOSURE.

The proposed regulations provide that when the Government receives data in the form of commercial limited rights technical data or commercial restricted rights computer software, the Government still has a broad right to disclose that data. This is also true with respect to copyrighted data. Disclosure can be made to actual or potential competitors for purposes such as repair, installation, evaluation, competition and/or use by another contractor in the furtherance of the Government's program of which that contract is a part. First, the Government's blanket right to disclose proprietary commercial data appears much broader than the legitimate needs underlying such a right of disclosure. For example, there appears little realistic need for the Government to be able to provide all or part of a commercial software product, in which the Government already has a license, to a third-party for evaluation. Second, although the proposed regulations contain a nominal attempt to restrict further disclosure, the broad exceptions to the Government's non-disclosure obligations effectively swallow what little protection is offered. When the Government discloses such proprietary commercial data to competitors, the protections are generally regarded as inadequate to prevent the misuse or loss of that proprietary data. We remain unconvinced that the present non-disclosure agreements and procedures intended to protect a vendor's proprietary data afford true protection.

In meeting its own needs, the Government should make certain that it does not contribute to the usurpation of a contractor's valuable intellectual property. We respectfully request that the Government implement a two-step modification of the proposed regulations. First, we urge that the scope of the Government's right to disclose all or part of a commercial software product be dramatically limited. Second, we urge that the Government accept the responsibility of providing contractors with advance written notice of the identity of the third parties that will have access to proprietary data as well as the identification of the data to which the third-party will have access so that compliance can be independently monitored.

VI. COMMERCIAL PRODUCTS.

Section 824 of the Defense Authorization Act for Fiscal Years 1990 and 1991, Public Law 101-189, requires the Department of Defense to establish new procedures for the acquisition and distribution of commercial products and to further analyze the extent to which existing regulations are an impediment to the acquisition of commercial products. The proposed rule and request for comments, published in the July 11, 1990 Federal Register, is intended to simplify the process for the acquisition of commercial products. The procedures proposed by DoD require that the Government: (1) abstain from using Government specified designs or unique specifications; (2) minimize the acquisition of technical data; (3) accept commercial warranties for commercial products; (4) accept the use of commercial markings and packaging practices; and (5) not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order. See 55 Fed. Reg. 28514.

The Proposed Rules' burdensome notification, marking and approval obligations, as well as the demand for additional rights in commercial software products beyond those rights ordinarily provided to commercial users of the same product, clearly contradict the Department of Defense's stated policy. We urge that the Proposed Rules be revised to reflect a Government-wide policy that commercial computer software and related technical data will be acquired via simplified procedures wherein the Government will: (1) not use Government specified designs or Government unique specifications; (2) minimize the acquisition of technical data and rights therein; (3) acquire commercial warranties; (4) accept commercial markings and packaging practices; and (5) not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order.

VII. CONCLUSION.

The primary assets of most vendors of commercial software are the proprietary rights. Loss of these assets by mandatory or inadvertent transfer of unnecessarily broad rights to the Government can be disastrous. Yet the proposed rules for transfer to the Government of rights in technical data, which were published in the Federal Register on October 15, 1990, can result in this type of loss. While many software vendors for whom the Government is a primary market can invest the time and financial resources necessary to become familiar with, and to comply with, the regulations applicable to transfers of technical data to the Government, the Government regularly acquires commercial software products from vendors that are neither familiar with the regulations nor regard the Government market as essential to the economic future of their company. We believe regulations can be drawn which would allow these vendors to avoid the potential loss of their most valuable assets without depriving the Government of its ability to acquire those rights necessary for the Government to meet its objectives.

As highlighted earlier, we strongly urge that the proposed regulations be revised to provide the following: (1) the Government's acquisition of manuals and instructional materials accompanying commercial computer software will be with the same restricted rights that applies to the commercial computer software; (2) the regulations will clearly and unambiguously set forth provisions establishing the legal effect of affixing only a copyright notice to commercial software; (3) commercial software products which bear normal copyright and commercial markings will be licensed by the Government with no more than restricted rights; (4) the Government's ability to disclose all or part of a commercial software product will be limited to those instances where such disclosure is absolutely necessary to meet an identified Governmental purpose; (5) in those instances where the Government must specifically acquire the right to disclose commercial software products, the Government will accept the initial responsibility of providing all contractors with notice of and the identity of the third party that will have access to that contractor's proprietary data; and (6) commercial computer software products will be acquired via simplified procedures that will include: (i) a prohibition on the Government's ability to use Government specified designs or Government unique specifications; (ii) minimization of the Government's ability to acquire technical data and rights therein; (iii) a requirement that the Government will acquire commercial warranties unless identified, legitimate needs justify the acquisition of a broader warranty; (iv) the Government's acceptance of commercial markings and packaging practices; and (v) the Government's limitation of the requirement for flow-down clauses and provisions.

If you have questions regarding our comments or believe supplemental material is necessary, please do not hesitate to contact Fred M. Greguras in our Palo Alto office at 415/858-7241 or Douglas J. Cole in our Washington, D.C. office at 202/463-6300.

Respectfully submitted,

FENWICK & WEST

By: 

Partner

January 31, 1991

Ms. Linda W. Neilson
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Re: Advanced Notice of Proposed Rulemaking on Rights in Technical Data and Computer Software, 55 *Federal Register* 41788, October 15, 1990, Case No. 90-438.

Dear Ms. Neilson:

Fujitsu America, Inc. raises the following issues and provides the following specific comments with respect to the above referenced proposed regulations [hereinafter referred to as the "Proposed Rules"]. We look forward to the Council's consideration of and response to these comments.

I. THE DEFAULT STATUS FOR THE GOVERNMENT'S ACQUISITION OF *COMMERCIAL* TECHNICAL DATA AND COMPUTER SOFTWARE SHOULD NOT BE UNLIMITED RIGHTS SINCE THE PRESUMPTION THAT THE GOVERNMENT ACQUIRES SUCH RIGHTS IS CONTRARY TO STATED POLICY AND APPEARS TO LACK LEGITIMATE GOVERNMENTAL PURPOSE.

A. The Proposed Rules are unclear on whether a pre-existing commercial product containing only copyright and/or commercial restrictive legends receives the protection that would otherwise be afforded it if the prescribed Limited Rights or Restrictive Rights legend appeared on that same product. By recognizing a contractor's rights in a pre-existing commercial product only when the contractor uses a Government-specific legend, the Government places undue importance on the presence of such a legend and makes unfair demands on commercial vendors during the procurement process.

Consider the following illustration. Copyright law provides, through provisions granting exclusive rights to the copyright holder, certain minimum protections for licensors of pre-existing commercial software and the related technical data, *i.e.*, manuals and instructional materials. Contrary to established law, the Proposed Rules take the position that the presence of only a copyright legend on pre-existing commercial products poses no restrictions on the Government's use, modification, disclosure, or distribution of that product. Further, the rights demanded as a minimum requirement for doing business with the Government are, in fact, the equivalent of copyright ownership. This requirement vastly exceeds the rights afforded a non-Governmental licensee of that same commercial product. Moreover, a potential offeror that uses standard commercial means to protect its intellectual property may be, directly or indirectly precluded from the competitive process.

The discussion of Governmental policy clearly states that a contractor should "not have to relinquish legitimate rights it has in data as a condition for obtaining a government contract. See Section II.A, 55 *Fed. Reg.* at 41789. The Proposed Rules, however, do not implement this stated policy. The Proposed Rules instead further an unstated agenda that the Government will obtain the broadest possible rights in commercial products, regardless of whether the Government has an identified and legitimate need in obtaining such rights. In effect, if Government personnel choose the "default" position, and neither investigate nor make any determination regarding the minimum necessary rights (a task that admittedly may be difficult), the contractor is either required to relinquish its legitimate rights in order to obtain Government business or forced to withdraw its products from the Government marketplace.

B. We are concerned with the cavalier approach towards the protection of trade secrets contained in unpublished, copyrighted technical data associated with pre-existing commercial software. This technical data has remained unpublished because it contains trade secrets. As a matter of law, if the owner allows unrestricted disclosure of the trade secret, that trade secret is destroyed. Under the Proposed Rules, however, a contractor providing a pre-existing unpublished, copyrighted commercial product to the Government has no recognized means by which to protect trade secrets embodied in such materials. The use of standard copyright or commercial legends should not result in the Government's unfettered right to use, modify, distribute or disclose such valuable information. We urge that the Government adopt a position which, at least in the case of pre-existing commercial products, requires the Contracting Officer in conjunction with the acquiring activity, to identify in writing and acquire only the minimum rights necessary to accomplish its legitimate objective.

C. We are also concerned with the Government's demand that it receive the right to modify pre-existing commercial software including software that is embedded and/or bundled into a larger product. Under copyright law, this right is specifically reserved to the copyright-holder unless it is expressly granted in a written license. Initially we note that the Government's demand for the right of modification in all situations adversely affects a contractor's ability to warrant the product containing the software and may also subject that contractor to unnecessary liability claims should a modified product fail.

There is, however, a larger problem associated with the demand for the right of modification. Vendors of commercial products that contain pre-existing commercial computer software that is either embedded into a non-human readable media and/or bundled into larger computer programs frequently do not receive the right of modification. These contractors are often themselves licensees with only the right to *use or distribute* the computer software. Since a vendor/licensee lacks the right to modify, it must reject a sublicensee's demand to be allowed to make modifications. This is not an issue until the Government determines that it wants to purchase a commercial product. By demanding the right to modify commercial products, the Government essentially requests that industry "unscramble the eggs" solely for the convenience of the Government.

We urge that the Government recognize the realities of the commercial marketplace and accept standard copyright and commercial legends as constituting, without more, clear limits on the Government right to use, modify, disclose or distribute that commercial product. Contractors providing pre-existing commercial computer software and related technical data should not be surrounded by substantial legal risks merely for doing business with the Government. We also urge that the Government re-assess its demand for unlimited rights in pre-existing commercial technical data related to commercial software. Such technical data should receive that same protection provided for the restricted rights commercial software with which the technical data is associated. Finally, we believe that the Council should implement its stated policy, *i.e.*, that a contractor should "not have to relinquish legitimate rights it has in data as a condition for obtaining a government contract," through clear and effective regulations that can be relied upon by vendors of commercial products.

II. THE PROTECTIONS AFFORDED LICENSORS OF PROPRIETARY SOFTWARE AND TECHNICAL DATA WHEN DISCLOSURE IS EITHER LIKELY OR REQUIRED ARE INADEQUATE TO PROTECT THE PROPRIETARY NATURE OF THE SOFTWARE AND TECHNICAL DATA.

A. In instances where the Government receives limited rights technical data or restricted rights commercial software, it also requires at a minimum, the right to disclose that technical data or computer software to actual or potential competitors for purposes including repair or use in the Government's overall program. In instances where the Government discloses this technical data or computer software to actual or potential competitors for purposes, including repair or use in the Government's overall program, there are no verifiable protections that are provided to the original contractor in order to prevent the misuse of that technical data.

We do not believe the present non-disclosure agreement and procedures for providing notification of disclosure offer adequate protection. The Government should have the responsibility of providing all contractors to all agencies with notice of which third parties have had access to the proprietary information in order to allow the contractor to independently monitor that third parties' compliance with the non-disclosure agreement. Furthermore, the Standard Non-Disclosure Agreement should require recipient contractors to adopt and maintain operating procedures designed to prevent *unauthorized use* of such proprietary information.

B. Where the Government receives Government Purpose Rights, the Proposed Rules state that the Government receives the right to "use, duplicate and disclose detailed design, manufacturing and process data and computer software by or on behalf of the Government, including disclosure outside the Government for any Government

purpose." Please clarify whether "any Government purpose" still includes competitive reprocurments or other instances where such data would be disclosed directly to actual or potential competitors.

If competitive reprocurement remains a "Government purpose," the Government must be willing to provide all contractors to all agencies with notice of which third parties have had access to the government purpose rights data in order to allow the contractor to independently monitor that third parties' compliance with the non-disclosure agreement. Furthermore, we believe that the Standard Non-Disclosure Agreement should require recipient contractors to adopt and maintain operating procedures designed to prevent *unauthorized use* of government purpose rights data.

III. REQUIREMENTS FOR PLACING A LEGEND ON A PRODUCT OFFER LITTLE OR NO PROTECTION FOR EMBEDDED AND/OR BUNDLED COMPUTER SOFTWARE.

A. As illustrated in the case of *Secure Services Technology, Inc. v. Time & Space Processors, Inc.*, 722 F. Supp. 1354 (E.D. Va. 1989), existing regulations inadequately address legends for embedded computer software embodied in a larger product. In *Secure Services Technology*, the Government allowed a competitor of the plaintiff access to software embedded on a chip in a facsimile machine. Access to the software was obtained, not by opening the machine, but by use of a protocol analyzer. Since the contractor had failed to use the appropriate restrictive legends, it lost its right to challenge the Government's use of the software embodied in that chip.

The problem then, as now, is that there are instances where it is impossible and/or impractical to use a restrictive legend. Some media, including chips or other technology, are so small that they prohibit the use of a nominal copyright legend much less the restricted rights legend. The problem is further compounded where, as in the case of *Secure Services*, the output is never intended to be in human-readable format.

Even with the addition of the new legend for embedded computer software, we do not believe the issue raised in *Secure Services Technology* has been adequately addressed. The appropriate means for a contractor to maintain protection of its intellectual property is for the regulations to require that the Government recognize standard copyright and commercial legends as maximizing the contractor's rights in the commercial product, including products where neither the software nor its output is human-readable.

B. Another problem faced by suppliers of commercial hardware or software involves technical data and computer software provided under an OEM agreement with a prime contractor or an upstream subcontract. OEM's generally do not allow a supplier of components to include legends or trademarks which indicate the origin of the components. Therefore, suppliers of components under OEM agreements are likely to be precluded from providing the required Government-specific notices and placing the appropriate legends onto their limited rights technical data and restricted rights computer

software. Unless the Government accepts the standard copyright and commercial restrictive legends, this class of suppliers will be unable to protect their commercial products from unrestricted use and disclosure by the Government.

IV. THE TIME PERIOD OF FIFTEEN DAYS TO PREPARE AN APPEAL OF A CONTRACTING OFFICER'S FINAL DECISION ON A VALIDATION CHALLENGE IS TOO SHORT.

The Proposed Rules provide that a contractor has only fifteen days to respond to a Contracting Officer's adverse decision in a validation challenge. We are unaware of specific statutory authority that allows a shorter timeframe for the appeal of Contracting Officer's final decision than that which is specified in the Contract Dispute Act.

V. THE PROPOSED RULES SHOULD EMPHASIZE THE POLICY THAT GOVERNMENT AGENCIES MUST SIMPLIFY PROCEDURES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS.

Public Law 101-189 requires the Department of Defense to establish new procedures for the acquisition and distribution of commercial products. The Request for Comments, published in the July 11, 1990 *Federal Register*, states that the intent is to simplify the procedures used in the acquisition of commercial products. See 55 *Fed. Reg.* 28514, *et seq.* As part of these proposed policies and procedures, the Government would: (i) not use Government specified designs or Government unique specifications; (ii) minimize the acquisition of technical data; (iii) acquire commercial warranties; (iv) use commercial markings and packaging practices; and (v) not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order.

The Proposed Rules' burdensome notification and marking obligations and the demand for additional rights in commercial computer software and related technical data that are not otherwise provided to commercial users of those same products clearly contradict the Department of Defense's stated policy. We urge that the Proposed Rules be revised to reflect a Government-wide policy that commercial computer software and related technical data will be acquired via simplified procedures wherein the Government will: (i) not use Government specified designs or Government unique specifications; (ii) minimize the acquisition of technical data and rights therein; (iii) acquire commercial warranties; (iv) use commercial markings and packaging practices; and (v) not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order.

VI. CONCLUSION.

In conclusion, we restate our suggestions as follows:

1. The Government should accept standard copyright and commercial

Ms. Linda W. Neilson
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Page 6

legends as constituting, without more, clear limits on the Government right to use, modify, disclose or distribute that commercial product. The appropriate means for a contractor to maintain protection of its intellectual property is for the regulations to require that the Government recognize standard copyright and commercial legends as maximizing the contractor's rights in the commercial product.

2. The Government should require, at least in the case of pre-existing commercial products, that the Contracting Officer identify in writing and acquire only the minimum rights necessary to accomplish its legitimate objective.

3. The Government should re-assess its demand for unlimited rights in pre-existing commercial technical data related to commercial software. Such data should receive that same protection provided for the restricted rights commercial software.

4. The Government should implement its stated policy through clear and effective regulations that can be relied upon by vendors of commercial products.

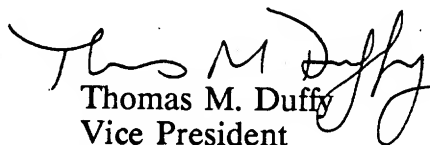
5. The Government should have the responsibility of providing all contractors to all agencies with notice of which third parties have had access to the proprietary information in order to allow the contractor to independently monitor that third party's compliance with the non-disclosure agreement.

6. The Standard Non-Disclosure Agreement should require recipient contractors to adopt and maintain operating procedures designed to prevent *unauthorized use* of such proprietary information.

7. The Government should simplify procedures for the acquisition of commercial products wherein the Government will: (i) not use Government specified designs or Government unique specifications; (ii) minimize the acquisition of technical data and rights therein; (iii) acquire commercial warranties; (iv) use commercial markings and packaging practices; and (v) not require contractors to flow-down clauses and provisions to suppliers and subcontractors unless those provisions are expressly required by statute or Executive Order.

Should supplemental information be required or desired, please contact me at your convenience.

Sincerely,



Thomas M. Duffy
Vice President
Fujitsu America, Inc.



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January 31, 1991

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Washington, DC 20301-3062

RE: FAR/DAR Case 90-438

Dear Ms. Neilson:

On behalf of the Information Industry Association, I am pleased to submit the following comments on the advance notice of proposed rulemaking on changes to the Federal Acquisition Regulation (FAR) with respect to rights in technical data. These comments are directed to the proposal appearing in the Federal Register for October 15, 1990 at pages 41788 et seq., and page references are to that publication.

I. INTEREST OF THE INFORMATION INDUSTRY ASSOCIATION

The Information Industry Association (IIA) is a trade association representing hundreds of companies pursuing business opportunities associated with the creation, distribution and use of information. Many IIA members contract with federal government agencies to provide a wide variety of information products and services, ranging from traditional ink-on-paper products to computer software to electronic databases in a variety of formats (e.g., online, CD-ROM, etc.). In many cases, the products and services provided to federal agencies are substantially identical to those marketed commercially by the IIA members involved. In other cases, information products and services are customized for government markets, or are designed and developed solely to meet federal government needs. IIA members participate actively in procurement vehicles such as FEDLINK, GSA/FSS and GSA/IRMS schedules, and registries and gateways through which federal agencies obtain access to needed information products and services. In addition, since its founding in 1968, IIA has participated actively in policy debates on proprietary rights issues, including particularly the development of copyright laws and policies for electronic information products and services.

IIA members have an active interest in the development and implementation of clear, consistent regulations governing federal procurements of information products and services. Accordingly, IIA commends the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration for issuing the advance notice of proposed rulemaking (ANPRM) and "encourag[ing] comments, suggestions, recommendations and rewrites." (41788) IIA also supports the general policy approach enunciated in the policy summary (41789) that the government should "obtain only those rights in data that it needs."

IIA recognizes that the proposal advanced in the ANPRM does not specifically address rights in technical data for commercial products (other than commercial software) (41790), and thus many federal procurements of information products and services provided by IIA members fall outside the proposal's scope. At the same time, several important provisions of the ANPRM would, if adopted, affect the participation of IIA members in federal markets. Other provisions could, if adopted, set precedents that would affect the vital interests of IIA member companies in other policy contexts. Accordingly, while IIA is not prepared at this juncture to take a definitive position on any aspect of the ANPRM, IIA offers the following comments for agency consideration as the proposal advances toward the next stage.

II. COMMENTS

A. Status of commercial information products and services. The ANPRM states that "[r]ights in technical data for commercial products (other than commercial software) have not been addressed specifically in this advanced notice of proposed rulemaking....It is possible that separate coverage may be more appropriate." (41790) IIA agrees that commercial products, including commercial information products and services, merit separate consideration, and perhaps, separate coverage in a final FAR revision. The issues of allocation of data rights are far different in the context of commercial information products and services than they are in, for example, the procurement of a weapons system or computer hardware. However, IIA questions whether the actual language in the proposed FAR revisions fully carries out the intent stated in the introductory provisions of the ANPRM quoted above.

The operative language for excluding most commercial information products and services from coverage under the proposed FAR revisions appears at 41801, in proposed sec. 27.406(d)(ii):

[N]o clause contained in this subpart is required to be included in ---

...

(ii) Other contracts ... that require only existing data (other than limited rights data) to be delivered and such data are available without disclosure prohibitions, unless reproduction rights are to be obtained....No clause in this subpart is required to be included in contracts substantially for on line data base services which are available to the general public without restriction.

This language may not be sufficiently broad to carry out the intent to exclude commercial information products and services from the proposed FAR revisions. While the last quoted sentence explicitly excludes online services from coverage, it fails to make clear that commercial information products and services in other formats should also be excluded. For example, an "off-the-shelf" CD-ROM product may fill a niche similar to that occupied by a generally available online service. As a rule, both should

receive identical treatment with regard to allocation of data rights. The ambiguous scope of the exclusion of electronic information products and services may be contrasted with the provisions of proposed sec. 27.406(d)(i), which clearly excludes "contracts solely for the acquisition of books, periodicals and other printed items...". The exclusion needs to be just as unambiguous for electronic information products and services, which include (although they are not limited to) the content of "books, periodicals and other printed items" in non-print form.

The ANPRM includes an "outline of a suggested approach" to allocation of data rights in commercial products (41790-91). IIA has no comments to make on this outline at this time, except to note that even here the focus seems to be on commercial hardware and similar products, rather than on commercial information products and services. The goal of clear, consistent procurement regulations for information products and services will best be served by rules that specifically balance the interests of government and of vendors of those products and services themselves.

B. Definitional provisions. IIA offers the following comments on proposed sec. 27.401 (41792-93):

(1) IIA commends the effort to draw a clear delineation between "computer software" and "data bases" for purposes of the FAR. Particularly if, as proposed, commercial computer software is to be treated differently than commercial data bases, an accurate, clear and practical demarcation is desirable. We would note, however, that any definition may be difficult to apply in practice, especially to products that combine databases and retrieval software in one package. Furthermore, in applying this definition, it may be necessary to distinguish between the government's direct acquisition of a database from a commercial provider, and the government's procurement of access to a commercially available database.

The significance of a clear definition distinguishing software from databases extends beyond the FAR revision context. Proposals are pending before Congress to amend the Copyright Act to allow the federal government to assert copyright in some software developed by federal employees. As these proposals are considered, the need for clear demarcation between potentially copyrightable software and uncopyrightable databases is sure to emerge as an important issue. The resolution of this issue in the FAR could well be influential in the legislative context as well.

(2) The proposed definition of "restricted rights computer software" (41793) seems somewhat ambiguous. It is limited to software that is not "publicly available;" yet other provisions of the proposed FAR revision imply that commercial software (which is, of course, "publicly available") can be "restricted rights computer software" under some circumstances. See, e.g., sec. 27.404-3(b)(6)(restricted rights software presumed to be published if delivered with copyright notice). Also, sec. 27.406(c)(2) of the proposed revision (41801) seems to authorize the government to use either the commercial computer software clause or the restricted rights computer software provisions when acquiring software. This could leave a vendor uncertain about whether a particular piece of commercial software needs to be marked with a restricted rights notice.

Finally, the proposed definition of "restricted rights computer software" departs from the existing definition in the civil FAR by omitting the reference to "minor modifications of such computer software." This deletion seems to imply that minor modifications to commercial software that are made by the vendor at government request are owned by the government, not by the vendor. IIA urges that these ambiguities be clarified.

C. Marking, notice and permission requirements. Several aspects of the proposed FAR revisions address the consequences of marking data or affixing copyright notices thereto. These provisions should be carefully scrutinized for possible conflict with recent copyright law developments. These include changed statutory requirements of the Copyright Act, the recent accession of the United States to the Berne Copyright Convention, and U.S. policy positions in recent international copyright negotiations.

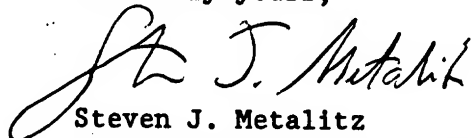
For example, the Copyright Act was amended in 1988 to eliminate the requirement of copyright notice as a condition of protection. This was done to conform with the requirements of the Berne Convention. A contractual provision that "the Government assumes no liability for the disclosure, use or reproduction of ... data" not marked with a copyright notice (41802) may not technically violate the Copyright Act or Berne standards. However, it is certainly inconsistent with recent developments in U.S. copyright law, and should be carefully reviewed in light of discussions of copyright sovereign immunity in international copyright negotiations in the GATT and elsewhere. Similarly, the Copyright Act provides that copyright automatically subsists in all works of authorship from the time of fixation, see 17 U.S.C. 102(a). The ANPRM provisions, by contrast, assert that the right of the author to claim copyright in certain works of authorship may legally be conditioned upon obtaining "prior express written permission of the contracting officer," sec. 27-404.5(c). In some cases, the apparent discrepancies between the proposed FAR revisions and copyright statutory and treaty requirements may simply be the result of imprecise wording. However, in IIA's view, the entire section on copyrighted data (sec. 27.404-5) (41796-7) would benefit from a thorough re-examination in the context of these legal obligations.

There also may be practical problems with some of the marking provisions applicable to software products. For example, the ANPRM lacks any provisions as to how the required restricted rights legend may be placed "on the software." The current DFARS gives some guidance as to whether the notice must be machine-readable, whether it can be placed on software packaging or sleeves, and similar issues. Instead of eliminating these provisions, they should be expanded to address questions such as whether legends that appear in the screen displays are acceptable to meet marking requirements. Administrative burdens may also arise from the fact that, under the ANPRM proposal, a vendor may be required to mark commercial computer software with a restricted rights notice, while the instructional manuals for that software may carry a limited rights notice. Consideration should be given to retaining the current policy, which requires the same legend on both the software and the associated instructional manuals.

D. Limiting release of data. Proposed sec. 27.404-6 (41797) authorizes agencies, under some circumstances, to "place limitations or restrictions on the contractor's right to use, release to others, reproduce, distribute or publish any data first produced in performance of the contract" in order to protect "established programs ... of the agency," conform to "regulatory ... requirements," or prevent "unauthorized or inadvertent release or dissemination of the data contrary to ... national policy regarding the disclosure of technical information, even if unclassified." While the ANPRM leaves unclear the circumstances under which such restrictions may be imposed, IIA does not object in principle to the availability of such contractual restrictions. We would note, however, that to the extent such restrictions are based upon programmatic, regulatory or policy requirements not embodied in a specific statutory exception to disclosure under the Freedom of Information Act, the restrictions, while contractually binding upon the vendor, may not prevent the disclosure of the data from the government to a FOIA requester. In such circumstances, contractual restrictions on disclosure may be of little utility and could even disadvantage the vendor with respect to a competitor who obtains the data under FOIA.

In conclusion, IIA appreciates the opportunity to comment on the ANPRM on rights in technical data. We would be glad to provide further information on any of the issues discussed above, and look forward to further participation in the development of clear, consistent standards in this important policy area. Thank you for your consideration of our comments.

Sincerely yours,



Steven J. Metalitz
Vice President and Counsel

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c/o OUSD(A)(M&RS)
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Washington, D.C. 20301-3062

Re: FAR/DAR Case 90-438

Dear Ms. Neilson:

This is in response to the advanced notice of proposed rulemaking for the acquisition of technical data and software by Federal Government agencies. 55 Fed. Reg. 41,788 (1990). These comments are submitted on behalf of certain clients of this firm that have expressed particular concern with the rights obtained by the Government in the acquisition of commercial software. Consistent with the purpose of the advance notice, we offer the following comments regarding the acquisition of commercial software which we believe are most appropriate for consideration at this preliminary stage of the rulemaking process.

The proposed rule commendably recognizes the significant distinction between commercial and non-commercial computer software. It is well beyond dispute that the Government can benefit substantially from the procurement of commercial items. These benefits certainly apply equally to the acquisition of commercial computer software. However, when a vendor must deviate from its standard commercial practices and treat sales to the Government in a different fashion, then the cost to the contractor (and the Government) increases. The requirement to provide the Government with rights, not normally provided commercial customers and the resulting requirement to mark specially, control and distribute commercial computer software to the Government, creates a disincentive for contractors that sell, license, or would otherwise consider distributing, commercial software to the Government. In general, we recommend that the vendors' standard commercial license or purchase terms should control the rights and obligations with respect to commercial computer software. Certainly the Government, like any other

Linda W. Neilson
January 31, 1991
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commercial customer, is not prevented from negotiating additional rights in the software.

The proposed regulations at 27.401 and the contract clause at 52.227-19 should incorporate explicitly a definition of "commercial computer software" consistent with the following definition of "commercial products" set forth in the supplementary information at III.B.1. (55 Fed. Reg. 41,790-41,791.)

"Commercial computer software" means computer software regularly used for other than Government purposes which, in the course of normal business operations:

- (a) Have been sold or traded to the general public;
- (b) Have been offered for sale to the general public at established prices but not yet sold;
- (c) Although intended for sale or traded to the general public, have not yet been offered for sale but will be available for commercial delivery in a reasonable period of time;
- (d) Are described in paragraphs (a), (b), or (c), above and would require only minor modifications in order to meet the requirements of the procuring agency.

The term "minor modification" (55 Fed. Reg. 41,791) should also be included explicitly in the regulation and contract clause.

The proposed regulation 27.406(c) and contract clause 52.227-19 should simply provide the Federal Government with the same rights and obligations in commercial computer software normally granted to and required of the public, unless additional rights are previously authorized and negotiated by the parties.

The, so-called, "minimum rights" set forth in the proposed regulation at 27.404-3(b)(1) and in the proposed regulation at 52.227-19(d)(2) are inconsistent with the acquisition of commercial software rights. Software licensees rarely permit a

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user to copy commercial computer software. In fact, some commercial software has specially created programs within the software which are designed to prevent duplication of the software. Furthermore, the right to modify, adapt or combine commercial computer software is a right that necessarily implies the right to modify or reverse engineer source code which is rarely delivered under commercial contracts. The disclosure and reproduction of software for use by the Government or their subcontractors is also inconsistent with commercial software practice which commonly attempts to restrict disclosure of even commercial software to competitors. In fact, proposed clause 52.227-19(d)(iv) presumes that the licensor of the commercial computer software has agreed to give the Government the right to grant permission to third party contractors and subcontractors to use the commercial software. This presumption is generally without foundation in the business practices of the commercial computer software industry. At the very least, we would recommend that the provision require the Government to disclose, in advance of the transaction, the essential facts involved in the anticipated disclosure to the Government contractors and their subcontractors.

We would also recommend that clause 52.227-19(d)(4) provide that the computer software may be marked with any appropriate notice consistent with the methods that the Copyright Office has determined to be an acceptable method of affixing copyright notice to software. See 37 C.F.R. § 201.20(g). Furthermore, the regulations and clause should provide explicitly that the Government is bound by the copyright statute and by the terms of restrictive legends or copyright notices affixed to the commercial computer software.

The provisions at proposed clause 52.227-19(e) provide the Government with a license under copyright to use and reproduce manuals and instructional materials for "Government purpose only." "Government purpose," however, is vague and should be defined with specificity. Moreover, commercial software vendors rarely provide a license for the reproduction of manuals and instructional materials. Here again, the parties can agree to negotiate separate copyright licenses, if necessary. The Government, like any other commercial customer, should be bound by the commercial computer copyright restrictions.

In summary, we would strongly recommend that the provisions of the regulation and the "Commercial Computer Software" clause be reconsidered and revised so as to bring it within the

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long-established and generally accepted business practices of the commercial software industry.

These comments are provided at this preliminary point in the rulemaking process to address only the acquisition of commercial computer software. As such, they are not intended to indicate approval of other provisions of the proposed regulation. We believe that comments on the other provisions will be more appropriate after a revised proposed rule is published which incorporates the public comments received to date. We commend these efforts to establish uniform regulations for the acquisition of technical data and computer software and look forward to the issuance of revised proposed regulation.

Very truly yours,

MCKENNA & CUNEO

By 

Wilsie H. Adams

WHA:mm



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JAN 24 1991

Ms. Linda W. Neilson
Procurement Analyst
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c/o OUSD (A)(M&RS)
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Washington, DC 20301-3062

Dear Ms. Neilson:

The Nuclear Regulatory Commission's Office of Information Resources Management (NRC/IRM) staff has reviewed the proposed rule on technical data (FAR/DAR Case 90-438) and has determined that it will have no significant impact on the NRC. The NRC sponsors much of its technical software development activities at National Laboratories through a Memorandum of Understanding with the Department of Energy (DOE). The resulting software is distributed through the National Energy Software Center (NESC) at Argonne National Laboratory. The DOE has developed procedures under which the National Laboratories may seek copyright in software generated under Government contract. The NRC is now considering endorsement of the DOE procedures for NRC funded work. If you have any questions please contact Mr. Louis Grosman, Chief, Codes and Standards Section, IRM at (301) 492-5019.

Sincerely,


Patricia G. Norry, Acting Director
Office of Information Resources Management

cc: Anne Horth, GSA
Richard Constant, DOE

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January 31, 1991

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Dear Ms. Nielson:

Re: FAR/DAR Case 90-438

The Proprietary Industries Association (PIA) is an association of companies who develop and manufacture products for use in commercial and military systems. PIA's member companies, which include companies of all sizes, develop their products at private expense and are typically subcontractors in the markets that they serve.

PIA, as a signatory to the multi-association comments of AIA, AEA, EIA, NSIA, PIA, SBC and NTMA, fully endorses the Industry Coalition Proposal on Rights in Technical Information as well as the Coalition's comments on the ANPR.

These supplementary comments draw attention to the need to scrupulously protect contractors' and subcontractors' rights in technical information originated at private expense. It is also essential that a regulation on this important subject afford subcontractors the same ability as contractors to protect their intellectual property right. While we feel confident that the Industry proposal intends to provide this protection, we are concerned that the ANPR does not.

The following points illustrate what appears to be the inconsistent treatment of subcontractors in the ANPR.

1. 10 U.S.C. 2320 clearly acknowledges

subcontractor's rights in technical data. The ANPR, which is riddled with the terms "contract", "subcontract", "contractor", "Contractor", "subcontractor", "developer" and "offeror" leaves open the question as to whether the requirements of 10 U.S.C. 2320(a)(2)(B) and 10 U.S.C. 2320(a)(2)(F) are satisfied in the ANPR. (See, for example, 27.402(c)(2), 27.404-2(b)(1), 27.404-5(c)(3), 27.405-2, 27.408)).

2. The subcontracting provision at 52.227-14(g)(4) appears to require contractors to comply with the law but suggests (in the same provision) that the contractor's contractual obligations may conflict with the law. The Government, by its regulation, should assume the responsibility that its personnel will not impose requirements on the contractor that are in violation of statutory protections for subcontractors. In addition, the regulation should not encourage contractors to abridge the statutory protections for subcontractor information.

3. Segregability is an extremely important element of the protection of a subcontractor's rights in technical information. Case Law (Bell Helicopter Textron ASBCA No. 21192, September 23, 1985 and others) applied this concept for trade secrets.

In a number of places (e.g. 27.401 definition of "mixed funding", 27.402(c)(2), 27.404-4(d), 27.405-2(a)(1) and 52.227-15(c)(2)(i)) these regulations limit "trade secret" protection to what is "readily segregable", "lowest practical identifiable level", etc. This is contrary to the statutory requirement that "such regulation ...not impair any rightof any contractor or subcontractor with respect to ...any other right in technical data otherwise established by law." (10 U.S.C. 2320(a)(1) and 41 U.S.C. 418a(a)).

While the preamble to the publication of the ANPR cites the importance of this concept, the text of the regulation fails to embody the concept as it has been applied by the judiciary.

Since we believe that the Industry proposal attempts to solve these and other fundamental problems posed by the ANPR, we strongly urge its favorable consideration. We have attached the industry coalition's response to questions posed by the

Government panel during the public hearings in order to assure further review of the statutory basis for the Industry proposal. We would be happy to discuss these and other issues with the Government at any time.

PIA appreciates the opportunity to comment on the proposed FAR at this early stage of its development and sincerely hopes that this approach will result in a regulation that deals with rights in technical information in a fair and equitable fashion.

Sincerely,



Bettie S. McCarthy

Executive Director

The Proprietary Industries Association

QUESTIONS ASKED BY GOVERNMENT PANEL
with respect to the INDUSTRY PROPOSAL
ON RIGHTS IN TECHNICAL INFORMATION

(1) 10 USC 2320 suggests that the "default" (in terms of rights) for government funded development is unlimited rights. The industry proposal changes that default. How does the Industry reconcile its position with 10 USC 2320.

ANSWER: We do not agree that the statute requires the default to be unlimited rights in technical data pertaining to items and processes developed exclusively with government funds. Moreover, there is no comparable provision in the companion statute, 41 U.S.C. 418(a), applicable to civilian agencies.

10 U.S.C. 2320(a)(2)(G)(ii) specifically permits the Government to agree to restrict rights "otherwise accorded the United States if the United States receives a royalty free license to use the technical data for purposes of the United States (including competitive procurement)."

The Industry proposal is consistent with this requirement. The Industry proposal requires the Government to first establish its intended use and needs for the deliverable technical information originated exclusively with Government funds, and then determine the rights in technical information required to satisfy those uses. Under the industry proposal, the Government may unilaterally elect Government Purpose Rights or Unlimited Rights if its intended use or need so requires. Neither Government Purpose Rights, or Unlimited Rights entail a royalty, and both allow use of deliverable technical information for "competitive procurements".

In sum, the statute does not require the Government to obtain rights in technical information in excess of its legitimate interests and purposes.

(2) If the minimum limited rights relating to items and processes in 10 USC 2320 is satisfactory for items and processes developed exclusively at private expense, why isn't it satisfactory for commercial products?

Answer: The question asks why the license rights for commercial products are different from the limited rights license under 10 U.S.C. 2320 for items and processes.

"Limited rights" in the context of non-commercial products means the right for the Government to use technical information by government employees for any internal government purpose. These generally include installation, operation, maintenance, repair and training as they relate to the product, including the authority to have such information used by non-governmental entities under limited circumstances (i.e. for emergency repair or for release to foreign governments for informational and evaluation purposes. (See 10 U.S.C. 2320(a)(2)(B) and (D)). Limited rights do not convey the authority to use technical information (or data) for design and manufacturing.

In the Government arena, a limited rights license gives the Government the right to do anything except that which is specifically prohibited. Where the Government is the only customer and user, this scope of license right is satisfactory to both parties.

With respect to commercial products provided to commercial customers, while there is probably a great deal of similarity between the two, the scope of the commercial product license may be different. For example, it is extremely rare for a commercial vendor to grant its customer the right to disclose technical information to any third party. For the commercial product, the license right specifically provides the scope of the permissible activity and no other purpose or use is authorized. Therefore, there is no standard commercial license right and there cannot be a standard license right that would be uniformly applicable across all commercial products and under all commercial market conditions.

(3) Reconcile the industry draft's treatment of commercial products with 10 USC 2320.

10 USC 2320 is silent on the issue of commercial products and rights in technical data. In the absence of specific direction under that statute, the Government is free to use its discretion to regulate the treatment of rights in technical information for commercial products.

It has long been recognized that even though the Government may claim rights in technical information that is not delivered, the Government cannot perfect those rights unless delivery is required.

So for practical purposes, the determination of rights in technical information relating to commercial products only applies to deliverable technical information. deliverable

technical information.

The civilian statute (See 41 U.S.C. 418a(a)) and Section 824 of the FY' 90 Authorization for the Department of Defense address technical data relating to commercial products in terms of "delivery" requirements. The Defense Authorization for FY 90 directs the Department of Defense to consider "Whether to establish a presumption that the Department of Defense should not request technical data on commercial items" (Sec. 824). The civilian statute on rights in technical data (41 U.S.C. 418a) instructs the civilian agencies not to require delivery of other than operation and maintenance technical data when dealing with products offered or to be offered to the general public.

DOD exercised the discretion in its proposed rule to change 48 CFR 211 in the Defense Acquisition Supplement, (FR Vol. 55 No. 133, Pg. 28528, 252.211-7017) DAR CASE 90-420). This proposal allows the Government to accept no greater rights in technical information than a commercial customer. It does permit the Government to require the delivery of operation and maintenance data but does not establish rights for the Government in that data. Finally, This DAR Case does not predicate the definition of commercial item, or commercial computer software on the source of development funding.

In our opinion, the Industry proposal is consistent with all of the relevant statutory authority outstanding.

(4) How does the Industry proposal comply with the Competition in Contracting Act?

Answer: The Industry proposal fully complies with CICA.

The Industry proposal is clear that the Government is always free to seek competitive reprocurement with technical information originated exclusively with Government funds, if it elects to do so. Unlimited Rights, or Government Purpose Rights both permit disclosure for purposes of reprocurement. Even when a contractor or subcontractor notifies the Government of an intent to commercialize, the Government may use the technical information to compete government procurements.

When the technical information is originated exclusively at private expense, the Industry proposal places an obligation on the Government to attempt form, fit and function competition, to purchase an item from the original supplier if the price is reasonable and the supplier has sufficient

capability to meet the Government's needs (in terms of volume and delivery schedule) or to reverse engineer. The Competition in Contracting Act does not restrict the definition of competition to competition between identical items and in fact, it affirmatively contemplates the alternatives above. (See 10 U.S.C. 2304(c)(1) and 10 U.S.C. 2305(d)(4)).

In our proposal, if these alternatives cannot be satisfied, the contracting officer should investigate the willingness of the supplier to direct license another supplier. (See 10 U.S.C. 2302(a)(2)(G)(iii)). Only after these alternatives have been exhausted is the Government to negotiate to obtain rights in technical information sufficient to reprocur the product or process.

(5) If the Industry proposal supports competition, how does it do so?

We support competition. The Industry proposal does not endorse the view that obtaining rights in technical information is the most effective means of achieving competition.

In the case of privately funded technical information origination, the Industry proposal clearly puts forth the view that competition between alternative products is the preferred method of competing a procurement.

(6) The relevant statutes [41 USC 418a and 10 USC 2320] require rights in technical data pertaining to items and processes, be allocated by source of funding. Even though the term "developed" is not defined, whatever definition is used must be applicable to an item, component or process. The relationship of the Industry proposal to items, components and processes is not clear. Clarify how the definition of "origination" conforms with the statutory language of "products and process".

ANSWER: We disagree that 41 U.S. C. 418(a)(c) requires the Government to allocate rights in technical data based on the source of funding of the development of an item or process alone. That provision requires the Government to consider the source of hardware development funding, as one of three factors, in promulgating its regulations. Further that statute refers throughout to technical data developed without tying it to items and processes.

Additionally, our interpretation of 10 U.S. C. 2320(a)

suggests that while source of funding is the primary test for the allocation of rights, there are provisions which allow for a contractor or subcontractor and its customer to mutually consent by contract to deviate from the source of funding test. (We do not believe the statute authorizes one party to unilaterally assert greater rights than they are entitled to under source of funding. The statute does allow either party to unilaterally decide to take less than it's entitlement under a source of funding test).

10 U.S.C. does address rights in technical data as that data pertains to hardware. The direction for the Secretary to define the word "developed", however, does not tie the term "developed" to items and components. Since we believe that the term "developed" can be defined as we define "origination" (and your question suggests that you concur), then the Industry formulation is fully consistent with 10 U.S. C. 2320.

The term "origination" is defined to be earlier in time than the time of contract award for development. It does not preclude DoD or any Government agency from exercising its entitlement to rights in technical information based on a source of funding test when hardware is to be developed.

The Industry proposal simply assures that the contractor or subcontractor may segregate technical information originated with private funds and technical information originated with Government funds, or with mixed funds when that information is applied to the development of hardware. The Industry proposal recognizes that the process does not begin at ground zero on the day of contract award.



The Research Foundation
of State University of New York

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November 6, 1990

Linda W. Neilson
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Washington, DC 20301-3062

**Re: FAR/DAR Case 90-438 (Federal Register/Vol. 55,
No. 199/October 15, 1990/p. 41788-41815)**

Dear Ms. Neilson:

Thank you for your attention to my inquiry concerning the Advanced Notice of Proposed Rule Making relative to rights in technical data. As you indicated, the rules would apply to all government contracts, but not grants.

However, the proposed rules do not distinguish between the deliverables required under contract and by-products of government funded research. For example, it is unclear which of "unlimited rights" or "government purpose rights" would apply in the event a computer program not specifically requested in an exclusively sponsored government contract resulted in the course of work on the respective project.

We look forward to a clarification of this matter in your next publication on the proposed rules.

Sincerely,

Albert E. Muir, Ph.D.
Licensing Associate

cc: Ms. Ryan
Mr. Schuler

✓

Taxpayer Assets Project

P.O. Box 19367; Washington, DC 20036

January 31, 1991

Linda W. Neilson
Procurement Analyst
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Dear Ms. Neilson:

RE: FAR/DAR Case 90-438

This is an updated version of the comments that we provided at the public hearing. Except for the removal of two sentences referring to the copyrighting of algorithms, this is the same as the statement we submitted at that time.

Sincerely,

Jonathan Dushoff
Jonathan Dushoff

Statement of James Love and Jonathan Dushoff
of the Taxpayer Assets Project

before the

Patents, Data and Copyrights Committee

January 25, 1991

Members of the Committee:

The Taxpayer Assets Project was founded by Ralph Nader to investigate the management of assets owned or financed by the government. Our work has focused on a number of publicly owned assets, including the rights to mine or develop oil and gas resources on public lands, federally managed timber, government information resources and intellectual property rights in government-funded research and development. We will provide the committee with one of our publications, an article titled "How Private Corporations Exploit Public Assets at the Expense of the Taxpayer," to explain what we are doing in these areas.

1. Introduction

The purpose of the proposed rule is to allocate the rights to technical data and software among the federal government and the private firms that receive funding from federal agencies. This rulemaking is a very important undertaking. It will govern the way all federal agencies dispose of a broad range of data. It will determine the allocation of property rights for data and software for agencies as diverse as the Department of Education the Department of Energy, the Occupational Safety and Health Administration and the Securities and Exchange Commission. Virtually every federal agency will be affected by this rule.

At stake in this rulemaking is the public's right to receive and use software, data and information that it pays for. The government's proposal would give government contractors, many of them huge corporate firms, the right to copyright technical data and software that was developed at taxpayer expense. Private firms would then be free to withhold this information from other researchers or software developers, or to sell this information to the public at whatever prices they choose, and keep all of the revenues.

There is much more at stake here than yet another example of government giveaways to large corporate interests. By limiting the dissemination of important technical information, this proposal will the impair the development of scientific knowledge. It will reduce the bargaining power of agencies in procurement negotiations. It will make it more difficult for federal agencies to develop open standards for important computer software functions. And it will create barriers to entry in many markets, leading to less competition.

Why is this proposal before us today? What is the empirical evidence to support the transfer of billions of dollars of government-financed data and software into private ownership? What theories are used to support the withdrawal of this software and technical information from the public domain?

These are questions that cannot be answered from reading the published notice of the advanced rulemaking. Nor can these questions be answered by contacting the officials referenced in the *Federal Register* notice, who refused to provide us with copies of the testimony or analysis that was presented during the December hearings, and who also refused to provide us with any background analysis that provided the rationale for this proceeding.

Our first recommendation is that this Committee prepare a statement about the purpose and nature of the proposed rule that is written in non-technical language and accessible to ordinary citizens, that will explain to the reader the theories and evidence that support the proposed policy. This will make it easier for citizens to understand what is at stake and why the policy has been proposed, and it will broaden the constituency which will comment on the rule.

The issues involved are quite complex. But this complexity does not excuse the committee from making the discussion more accessible. It is important that this committee hears from someone other than defense contractors and corporations that manufacture rockets.

2. The proposal covers an extremely broad range of data.

The proposal defines "data" as "recorded information regardless of form, the media on which it may be recorded, or the method of recording." This would cover an extremely wide range of data, including, for example, financial data collected for the government, design specifications of products developed for the government, bibliographies and research abstracts commissioned by the government, the results and underlying records of surveys conducted for the government and information from safety tests.

This leaves many unanswered questions. For example, how would the records of safety problems with the Space Shuttle program be treated under the proposed rule? Could this rule have the practical effect of preventing the public from having access to vast amounts of federally funded information, including the underlying data upon which important policy decisions are based?

3. The proposed rule establishes a default position that agencies should grant private contractors' requests for exclusive rights in data

We recognize that in some cases it may be desirable to allow private firms exclusive rights to technical data or software, when the transfer of such property rights is necessary to encourage commercial development. We believe that the federal government should have mechanisms to evaluate requests for transfers of such property rights. Such transfers should

not be presumed to be in the national interest, however. The burden to show that the public interest would be served by such transfers should be on the contractor who wants to benefit from the transfer.

The Advanced Notice of the Proposed Rulemaking (ANPR) errs in establishing a default position that the government allow contractors to copyright data or to allow contractors to restrict the government to Government Purpose rights in data. It puts the burden on agencies to be ever vigilant against transfers of property rights that will harm the public interest. This is an unreasonable burden. The agencies have limited resources, and often focus narrowly on a "constituency" of people with whom they interact regularly. It is unlikely that they will be able to adequately assess the needs of the broader constituency of scientists, taxpayers and citizens who would benefit from unrestricted access to government-funded technical information.

The practical effect of allowing contractors to copyright or take exclusive commercial rights to taxpayer-funded data will be to make transfer the rule rather than the exception. This policy would only make sense if there were persuasive evidence that such transfers would be appropriate in most cases. We haven't seen any such evidence, and we strongly argue that the contrary is true. Our reservations are strongest when the government is the sole funder of the project.

4. The benefits from broad dissemination of government-funded technical data and software are great.

It is very important to recognize the benefits from providing the public with broad access to government-funded technical data and software.

Promoting Free Market Competition

In many areas investment in basic research is a prerequisite to entry into a market. Because these costs are often sunk -- that is, they cannot be recovered -- they can represent important barriers to entry. Government-funded research often lowers this cost and makes these markets more competitive. If the government funds research but then gives contractors the right to withhold information from potential competitors, it will create a situation where the taxpayer is underwriting the cost of maintaining monopoly power.

Making Procurement More Competitive

The problems in promoting competition are particularly important when government procurement is involved. Large government contractors already receive substantial advantages over their competitors based on their contract work. Contract work allows companies to

obtain valuable experience and know-how at the government's expense. This gives contractors advantages both in competing for future contracts and in the commercial sphere. Allowing contractors to retain rights to data can aggravate this problem by increasing the advantages that contractors have over their competitors. The head start that results from government contracts already gives firms an advantage that can allow them to deter rivals and maintain or increase market shares.

When the government pays to develop an item, it must be free to use the data developed under the contract to ensure competition when it wants to buy the item again. Equally important, it must have access to the data to allow competition in improving the item, or designing new items based on principles discovered in the original item. To successfully develop a new generation of rockets, for example, it is almost indispensable to have free access to data concerning not only the design but also the manufacture of the last generation. The government should not pay to "reinvent the wheel."

Disseminating Data to Stimulate Innovation

When private firms own data, they do not allow broad dissemination of that information unless such dissemination will provide a commercial advantage. The free exchange of scientific ideas is immeasurably valuable for long term progress. Placing technical information in the public domain can be one of the most important side-benefits of government contracts for research or for procurement of high-tech items.

In a short preliminary study of inventions at D.O.E.'s National Laboratories last year, we encountered a surprising number of examples of inventions that began in the national labs and were developed as a result of information being placed in the public domain. Examples include the inventions that formed the basis of nuclear medicine; the laminar-flow clean room, which has been used in many applications to provide a clean environment for manufacturing and experiments; a technique that has been used by several oil companies to find ways to improve recovery from oil and gas fields; and the inductively coupled plasma mass spectrometer (ICP-MS) used in a variety of applications to determine what elements are present in various samples. Inventors said that these inventions had been disseminated and commercialized more rapidly because they were in the public domain, and expressed concern that the current atmosphere which stresses patents and exclusive data rights, and therefore secrecy, may interfere with development of future inventions.

Government-Funded Research and Software Development Help Set Industry Standards

Standard-setting is a valuable government role. When the government finances research or software development it should be aware of the importance of establishing standards that can be used to allow firms to create products that work together, or that allow firms to develop common definitions that improve communications or cooperation, or which lower industry

costs.

Keeping standards open makes markets more competitive. We have seen numerous efforts in the area of computer software and hardware to use patents and copyrights to control industry standards to discourage innovation or price competition. When the federal government funds technical research or software development, it can place results in the public domain and champion open standards that promote competition and innovation.

The government can also use its procurement clout to establish standards. For example, it could require that contractors use common record formats for the storage of technical data. If such data were in the public domain and available to other users, the broad user base would provide incentives to use those standards to make it easier to exchange and use technical data. This would hardly make sense if the contractor had exclusive rights to the data.

5. Proposed guidelines for determining rights in data.

When data or software are developed solely at government expense, the government should take unlimited rights unless the contractor petitions for exclusive commercial rights. The government should always retain at least Government Purpose rights, meaning the right to use or have others use the data (with appropriate protection) for any government purpose. The definition in the ANPR is a good one. A contractor requesting exclusive commercial rights should explain why such rights are necessary for commercialization of the invention. The government should consider the likelihood that the data would be developed usefully in the public domain before making a determination.

In cases where development is funded in part by industry, the government may need to allow the developer to obtain rights in the data or software. In these cases, the government should usually take full Government Purpose rights. The government should also consider retaining a royalty interest in copyrighted material, since if it shared in the expense of developing the data or software, it should share in the revenues from licensing.

The ANPR would treat certain kinds of government funding (Independent Research and Development, Bid and Proposal, and contractor overhead funds) as if they were private funds, and give the government no rights in the resulting data. We feel strongly that the government should always take at least Government Purpose rights in any data that it funds, and that it should evaluate whether greater rights would be appropriate.

We hope to propose additional specific criteria for the government to use in making data-rights determinations by the end of the comment period.

6. The industry proposal

The industry proposal ignores most of the benefits from broad dissemination and overstates the advantages of exclusive control. The proposal makes almost no pretense of striking a balance between the advantages of dissemination and the advantages of exclusive control. The proposal would drastically limit the rights of the government to processes, ideas and even products developed with public money. This would interfere with the statutory mandates of some agencies, with the achievement of the purposes of many contracts, and with the ability of the government to effectively obtain competitive bids for many contracts.

The idea in the industry proposal that the "originator" of data should control it is in striking contrast with industry practice. In the relationships of companies with both their employees and their contractors, the theme is that the supplier of the funding calls the shots. One of us recently worked as for a contractor that designed software for IBM, with the understanding that any code that was developed would belong to IBM, so that it could reassign the contract if it was unsatisfied with the contractor's performance, or make changes or improvements to the code. This is standard practice. Companies typically require employees engaged in research to relinquish rights in any intellectual property developed by the employee. Often employees must also contract not to develop ideas to compete with their company after their employment is over.

The industry proposal would allow the government to acquire rights only in "deliverable technical information" which means data that are specified for delivery in the contract. This would shut the government off from access to any data developed during contracts that are not specifically identified in advance as being an object of the contract. This would drastically reduce the government's access, even for Government Purpose rights, to a great deal of data that could be valuable for a number of reasons. For example, if a contractor were to use contract funds to develop a method of testing the item that was being produced, the government would have no access at all to data about the testing method unless such data had been requested in advance. In many cases it may be impossible for the government to predict in advance exactly what useful information will result from a contract.

The industry-proposed standards for the government obtaining greater than limited rights to technical data are extremely stringent. They would require a needs justification by the government -- that is, the government would have to establish why it needed rights in data that it paid to develop. It would further require that the government only take rights to data that resulted from "experimental, research or developmental work specified as an element of performance in the contract." This would invariably lead to a great deal of data "slipping through the cracks" and being unavailable to the government. It is particularly striking that these standards would apply to the government's ability to request even Government Purpose rights.

The industry proposal would also replace "developed" in the phrase "developed with government [or private] funds" with "originated." "Originated" is defined as meaning that

the data in question "has been set down in a tangible medium of expression for the first time for the purpose of documentation by the contractor or subcontractor." This is a vague definition which would allow industry to claim to have "originated" ideas even if government funds had been used to generate the data and would make it very difficult for the government to establish rights to ideas developed at public expense.

Industry's argument that the government should "take only what it needs" ignores the importance of technical information for the broader scientific community, and is completely untenable with regard to Government Purpose rights. A contractor which requests that the government take less than full Government Purpose rights can only benefit if the government later needs to come to the contractor again to use the data; that is, they can only benefit if the government is harmed. We see no basis in statute or even in the Executive Order for the government to take less than Government Purpose rights in data developed with government funds.

Thank you.



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January 25, 1991

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REF: FAR/DAR Case 90-438

We are a small business doing business for the past 20 years with DoD. In connection with proposed rule changes concerning protection of contractor's rights, we wish to express our strongest objection to the implementation of current rules in order, hopefully, to protect contractors like us, in the future.

To be brief, we maintain a substantial commercial business providing the open market with products similar to those sold to DoD. In order to maintain our business we have, within our organization, a substantial engineering staff dedicated to development of new products.

Certain of our contracts require supply of Level 3 (manufacturing) drawings with automatic transfer of data rights to the government inherent in the drawings. In several cases, however, certain components in these equipments are proprietary, having been developed previously at our own expense in connection with our ongoing business. The drawings depicting these parts provide, therefore, limited information intended to protect our rights, with such an arrangement acceptable to the procuring activity.

The intent here is simply that the government has no right to reproduce or cause to be reproduced, that item, without our express approval or specific transfer of those rights.

However, the Air Force violated our rights, in a recent incident, and actually provided our part, which we were fully able and willing to sell, to a competitor so that they could reverse engineer it and then sell to the government at a lower price. The government thereby conspired with a competitor to deprive us of our proprietary product, without compensation.

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In answer to our complaint the Air Force cited Defense Authorization Act (10 USD 2320(d)) which apparently allows the government to do anything it pleases.

There must be, within new rules, protection against this abuse by the government. Remedies for such abuse are only available through the courts which obviously is a costly, time consuming procedure which fact the government apparently uses to discourage offended parties from seeking redress.

Such actions on the government's part are ultimately counter-productive since contractors such as Trilectron, whose advanced products are necessary for operation of DoD, will not enter into contracts with the government since no protection is available to prevent the government from circumventing agreements by making up new loopholes along the way to legalize their theft.

There are 2 tiers of government contractors -- the creators and the copiers.

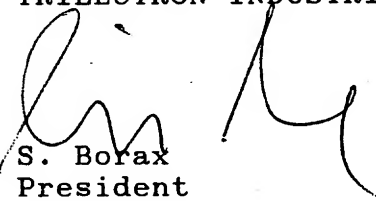
The creators employ engineers, etc., necessary to develop products and obviously selling prices must reflect costs for such employment.

On the other hand, the copiers sit on the sidelines while the creators spend their efforts and money to develop products, with costs often exceeding revenue. Then, after the government receives the product, it proceeds to turn the products over to the copiers to copy the design then sell to the government at prices far lower than the creators' since they have little or no overhead costs.

Ambiguous, easily circumvented rules must be eliminated, and strong protection against such abuses by contracting officers must be provided, otherwise the government will slowly lose its base of creative contractors.

Very truly yours,

TRILECTRON INDUSTRIES, INC.



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January 31, 1991

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The undersigned associations are pleased to provide comments on the advance notice of proposed rulemaking (ANPR) concerning a Federal Acquisition Regulation (FAR) rule on rights in technical data (FAR/DAR Case 90-438). This notice was published for public comment in the Federal Register of October 15, 1990 (55 FR 41788).

The "Summary" section of the notice advises that it is the government's intent to develop regulations on rights in technical data that are fair and equitable to both the government and industry. We are in full accord with this objective. In addition to the publication, six public hearings were held to allow for comments, discussions and presentations.

Because of our concerns with the interim rule on rights in technical data (issued in the Defense Federal Acquisition Regulation Supplement (DFARS) in October 1988) and other related government policies, a multi-association industry executive committee was established to articulate those concerns, seek resolution of them and recommend improvements in the government's technical data regulation. This industry executive committee is chaired by Arthur E. Wegner, Executive Vice President, United Technologies. Under policy guidance from the industry executive committee a subordinate working group developed a detailed set of policy principles upon which a fair and workable regulation on rights in technical data can be based. These policy principles were requested by and provided to the Deputy Assistant Secretary of Defense for Procurement, (Eleanor Spector) on April 3, 1990 (attachment 1). With the publication of the ANPR the industry team assumed the additional tasks of addressing the ANPR formulation of a government-wide regulation on rights in technical data and of developing an industry draft regulation incorporating the initial industry policy principles.



While the proposed FAR is some improvement over the interim DFARS rule with respect to the allocation of rights in technical data, the working group concluded that little had been done in balancing the interests between the government and industry. The primary objective of the proposed regulation still appears to be to acquire technical data for the purpose of competitive procurement, with rights in that data being a secondary objective. Our basic concerns are twofold. First is that the allocation of rights depends on the timing of development as implicit in the words "... or that has been developed during and were necessary for the performance of this contract." Under the proposed contract clause, 52.227-14 Rights in Data, the government would have unlimited rights in such technical data. Second is that the allocation of rights depends on who funded the development of a specific item or process. We have identified in attachment 2 many of our significant concerns with the ANPR.


As we addressed industry concerns in the public hearing process, the industry team determined that an alternative regulation had to be developed to translate our set of policy principles into regulatory language. This approach was encouraged by government representatives before and during the public hearings. We believe that a regulation on rights in technical data should be founded on the premise that the originator of technical information (data) is the owner of that information. Rights to that information are controlled by the owner. In our opinion this premise is in accord with intellectual property law and in compliance with existing statutes on rights in technical data and competition. Our proposal (attachment 3) provides for the government to have a limited rights license in deliverable technical information for internal government purposes. It provides for the government to elect greater rights where the deliverable technical information is government funded. It also provides for government purpose rights where the contractor expresses the intent to commercialize the technical information. Where the government needs greater rights, our proposal provides for the government to negotiate for such rights. To enhance timely access to deliverable technical information which the government has the right to use for procurement purposes, we have recommended as part of the industry proposal that the government contract with the originator/developer to be a repository for such information in order to provide to the government timely access to any and all such technical information.

The ANPR invited consideration of separate coverage on commercial products. We believe such coverage is appropriate and the industry proposal contains recommended language relative to the treatment of rights in technical information for commercial products. We also believe that rights in deliverable technical information related to computer software should not be lumped into a single contract clause on rights in deliverable technical information. This subject is of sufficient importance to deserve stand alone attention within a regulation on rights in deliverable technical information. Our proposal includes separate coverage for this matter.

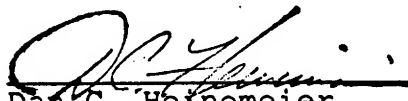
We believe that rather than continuing to band-aid a fundamentally flawed regulation, a new approach to solving this long standing problem should be pursued. Therefore we solicit your favorable consideration of the industry proposed regulation as the baseline for developing a government-wide regulation. We are committed to finding a lasting solution to this issue and would be pleased to meet with you and other government representatives to discuss our concerns and the industry proposal.



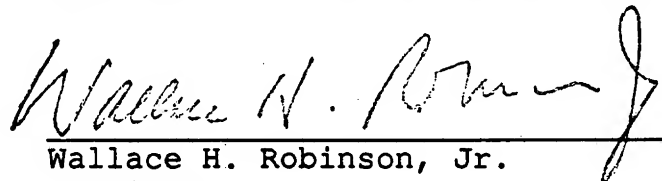
Don Fuqua
President
Aerospace Industries Association



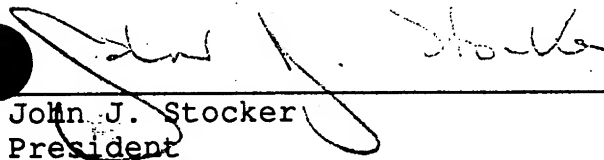
J. Richard Iverson
President
American Electronics Association



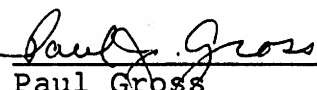
Dan C. Heinemeier
Vice President
Electronic Industries Association




Wallace H. Robinson, Jr.
President
National Security Industry Association



John J. Stocker
President
Shipbuilders Council of America



Paul Gross
Chairman of the Board
Proprietary Industries Association



Matthew B. Coffey
President
National Tooling and Machining Association

Attachments

ln-hf-as



UNITED TECHNOLOGIES

April 3, 1990

Ms. Eleanor Spector
Deputy Assistant Secretary of
Defense (Procurement)
OASD (P&L), Room 3E144
The Pentagon
Washington, DC 20301-8000

ATTACHMENT 1
United Technologies Building
Hartford, Connecticut 06101
203/728-7641

Arthur E. Wegner
Executive Vice President
President, Aerospace/Defense

Dear Ms. Spector:

In our December 14, 1989 meeting, you asked industry representatives to coordinate their activities in establishing a unified set of recommendations on how to deal with the long-standing issue of technical data. I agreed to coordinate that overall industry effort.

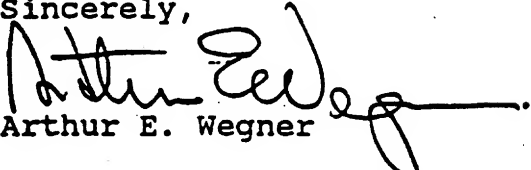
We established an industry team with representatives from Aerospace Industries Association, the Proprietary Industries Association (PIA), Electronic Industries Association (EIA), National Tooling and Machining Association (NTMA), Council of Defense and Space Industry Association (CODSIA), and National Security Industrial Association (NSIA). In an atmosphere of mutual trust and understanding, the team undertook an aggressive effort to identify, work and resolve the issues that caused us to be fragmented. Attached is the Unified Defense Industry Recommendations for Improving the DoD Regulation on Technology and Technical Data.

We fully recognize that our effort thus far is only the first major milestone toward achieving a fair and balanced regulation which could represent a lasting solution to this issue. However, we fully believe that can be achieved and stand ready to work with you to find a fair solution.

We believe the process that industry has pursued over the past 3 1/2 months in resolving its differences is evident in the product that we offer as our recommendation. We further believe that continuing the same process with DoD involvement could enable us to jointly achieve the next major milestone: a set of unified DoD/industry recommendations. Following that accomplishment and with continuing executive level attention and guidance, we should be able to work together to gain any necessary legislative changes. The ultimate objective of developing a concise, fair, workable and understandable regulation can then be accomplished.

We commend you for your initiative to bring industry together on this issue and believe that it forms the basis for us to work with you on issues of mutual interest in the future. We look forward to your response and are committed to working this issue to a fair conclusion.

Sincerely,


Arthur E. Wegner

AEW:s/24

cc: Industry Executive Committee
Drafting Team Members

(4)

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April 3, 1990

UNIFIED DEFENSE INDUSTRY RECOMMENDATIONS
For Improving DoD Regulation on Technology and Technical Data

(Note: Contract/contractor and subcontract/subcontractor can be used interchangeably in this document. Developer may mean contractor or subcontractor.)

Introduction

A committee of defense industry representatives, including members from the Aerospace Industries Association (AIA), Electronics Industries Association (EIA), the Proprietary Industries Association (PIA), the Council of Defense and Space Industries Association (CODSIA), the National Tooling and Machining Association (NTMA) and the National Security Industrial Association (NSIA) have worked jointly to develop a set of unified industry recommendations for improving the DoD regulation on technology and technical data.

Background

For the past five (5) years Government and industry have been working to resolve major differences in developing a fair and workable regulation on technology and technical data. Although progress was made during that period, the effort had reached an impasse with major issues still existing. Industry felt that executive level attention was essential for further progress. Through a series of meetings involving DoD and industry executives, it was decided that industry should establish a set of unified recommendations for developing a fair, concise and workable regulation on technology and technical data.

Industry believes that the Government procurement policies should be based on the following precepts: (1) technology development should be encouraged because its incorporation into vital defense systems is essential to national security; (2) commercial products and their modifications should be acquired whenever practicable and the Government should have no greater rights in the deliverable technical data than a commercial customer; (3) competition should be pursued whenever it facilitates the national security and is economically practicable; (4) contractor rights in technology are a property right and should not be acquired without a fair and reasonable compensation and (5) where the Government has acquired the rights to deliverable reprocurement technical data and pursues competition using that data, the Government should provide timely access to all potential suppliers who wish to compete for that reprocurement requirement. However, industry does not believe these precepts have been achieved by the present policies and regulations.

Improvements are needed both in the protection of contractors' rights in technology and in the timely availability of deliverable technical data needed for reprocurement. Both improvements can be accomplished without one impinging upon the other. Without such improvements, contractors will be discouraged from making future investments in technology for defense application and frustration will continue relative to limited competitive spare parts reprocurements.

Progress in working these issues can be made if it is first recognized that problems resulting from past contracting

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practices and from deficiencies in the Government repositories have inhibited effective competition due to lack of timely access and incompleteness of technical data which was not acquired generally for the purpose of competitive reprocurement.

Industry feels that we can build on the lessons learned from the current situation and that meaningful progress can be made in resolving the technology and technical data issues if they are dealt with first as business issues, then framed by legal considerations. Improved regulation must be founded in law, be fair to all parties involved, utilize the latest tools and concepts available to satisfy the requirements, recognize the impact that contract-enabling documents (DoD directives, specifications and standards) have on the data requirements and be developed as a cooperative effort by Government and industry in an atmosphere of mutual trust.

Recommendations

Industry believes that there are three separate but related issues: (1) rights in technology developed, (2) the acquisition of technical data when it is essential for Government needs, and (3) timely access to technical data which the Government has the right to use for competitive reprocurement purposes. Industry recommends that a fair, concise, and workable regulation be developed which defines rights in technical data based on the concept of "technology developed at private expense" and "technology developed with direct Government funds". Since the rights issue is applicable to all Government procurements, we recommend that it be dealt with Government-wide through appropriate modifications to the current Federal Acquisition Regulation (FAR).

Relative to DoD needs for deliverable technical data for training, installation, operation and maintenance and relative to guidelines for contracting officers in satisfying the competitive reprocurement needs of the Government, including the timely access to technical data for reprocurement purposes, we recommend that those issues be dealt with in DoD FAR Supplements.

In pursuing this recommended approach, industry offers the following policy principles and is committed to work with DoD in resolving these long-standing issues.

Recommended Policy Principles

1. Rights in Technical Data - FAR Modifications As Appropriate

- o Technology developed initially in performing a Government contract should be considered developed with direct Government funds provided the development is charged as a direct cost by the developer to the Government.
- o All technology developed under a contract with direct Government funds is the property of the developer, but subject to a Government royalty-free, non-exclusive license, including the right to license others for Government reprocurement purposes.
- o When both the Government and a contractor contribute to initial development of technology and it is impossible to

separate technology developed at private expense, Government rights should be negotiated.

- o Technology other than that set forth above shall be considered technology developed at private expense.
- o Technology initially developed for and included in commercial products and their modifications shall be considered technology developed at private expense.
- o In order for a contractor to protect rights in technology developed at private expense, in whole or in part, the deliverable data depicting that technology should be marked with an appropriate restrictive legend.
- o The validity of markings applied to deliverable technical data may be challenged in a timely manner through the contracting officer except for:
 - Data which was marked in accordance with a predetermination agreement between the contractor involved and the Government; or
 - Data relating to commercial products

2. Guidelines for Procurement Officials in Acquiring Technical Data - DoD FAR Supplement

- o The relinquishment of rights in privately developed technology shall not be a condition for being responsive to a solicitation or for a contract award.
- o The Government should specify its needs for deliverable technical data required for training, operation, installation and maintenance.
- o When the Government procures commercial products or modified commercial products, the contractor should be required to provide to the Government only that deliverable technical data, and with substantially the same rights as are normally delivered to its commercial customers.
- o When competitive reprocurement is deemed in the best interest of the Government and the Government does not have the right to use technical data for that reprocurement, the contracting officer shall consider alternative procurement techniques. Among these alternatives are:
 - Form fit and function specification(s)
 - Licensing of new sources by the contractor
 - Reverse engineering
 - Purchase of rights in deliverable reprocurement technical data
 - Contracting for a transferable license to a reprocurement technical data package
- o During contract performance, the design verification process should insure that the Government is not deprived of the use of deliverable technical data through inappropriate incorporation of technology developed at private expense for the purpose of limiting Government reprocurement rights.

3. Guidelines for Procurement Officials in Assuring Effective Competition and Providing Timely Access to Reprocurement Technical Data - DoD FAR Supplement

- o To enhance competition to the maximum practical extent, the Government should, as a part of procurement planning, make every reasonable effort to obtain and provide timely access to all deliverable reprocurement technical data which the Government has a right to make available, provided such action is cost effective and fully consistent with product quality and safety requirements.
- o Deliverable technical data in which the Government has a royalty-free, non-exclusive license shall be made accessible to potential suppliers of competitive reprocurement requirements in a timely way.
- o In new procurements where the Government is contracting for requirements which include delivery of technical data for the first time, the Government should have a policy for contracting with the developer to:
 - (i) Serve as the repository for the deliverable technical data including the reprocurement technical data and
 - (ii) Provide the Government timely access to such repository data upon request by the Government
- o Where the Government currently has in its repositories contractor developed and delivered technical data, which it has the right to use for reprocurement, but which do not meet the requirements for timely availability, and are not current, accurate, and complete for competitive reprocurement purposes, the Government should have a policy for contracting with the developer to:
 - (i) Update the contractor developed data which was delivered under the contract to meet reprocurement requirements and
 - (ii) Serve as a repository for future Government access/need for such updated data

4. Implementation

- o At their discretion and without additional consideration, contractors should be allowed to follow the new regulation in existing contracts having earlier versions of the regulation published September 10, 1985, April 16, 1987, April 1, 1988, or October 28, 1988.
- o To the extent that revisions to existing law are required to remove obstacles to obtain a regulation implementing these guidelines, the DoD and industry will cooperate in seeking those revisions.
- o The DoD should establish a program of scheduled reviews addressing DoD's implementation and industry's compliance with the regulatory requirements established by these policy guidelines.

KEY INDUSTRY OBJECTIONS TO THE OCTOBER 15, 1991 ANPR

The ANPR, much like the current interim DFARS, is long and promises to be difficult to understand and use, notwithstanding any improvements that may have been made. The text purports to clearly separate the issues of rights in data from the issue of delivery of data for competitive procurement purposes, but does not do so successfully.

- 1) The ANPR begins with the determination of the allocation of rights based on the timing of "development" of each specific item or process relating to hardware. (See 27.401(a).) We believe this test is unnecessarily restrictive and should focus instead on the technical information embodied in the hardware. In addition, we oppose the narrow focus on specific items or processes rather than on technical information.
- 2) The ANPR begins with what we believe to be a faulty premise that the government should obtain unlimited rights in data pertaining to an item or process. (See generally 27.404.) The regulation then compounds the problem by putting the burden on the contractor to come forward with proof to show that unlimited rights should not be the standard.
- 3) 27.402(c) of the ANPR includes a very good policy statement that "the Government shall balance the interests of the Government and the contractor by only obtaining minimal rights to technical data and computer software consistent with its needs". However, that statement is not carried out anywhere in the balance of the regulation. In fact, the balance of the ANPR appears to provide that the government's needs will always override the contractor's interests and that the Government appears to always obtain the most expansive rights to that technical information.
- 4) The ANPR specifically asks for comments on the term "required for performance" used in the October 1988 interim DFARS regulation, although that term is not used in this ANPR. The ANPR asks for comments on any other alternative, as well. Nevertheless, this ANPR uses a new term "developed during and necessary for the performance of this contract" (52.227-14(b)(1)(i)(B) when the Government gets unlimited rights). Some in industry view this term "developed during and necessary for the performance of this contract" as a more narrowly circumscribed term than "required for performance", and thus appears to move the regulation in the proper direction away from the complicated and controversial phrase "required for performance". The new phrase also adds a clear time frame to the critical issue in the ANPR regarding the timing of "development" of an item or process. However, others in industry view this term as having little practical difference from the term "required in performance." Further, the ANPR references, but does not adopt, other alternatives, such as notification, to the use of these terms. We believe that notice is far preferable to the adoption of the standard test of either "required in performance" or "developed during and necessary to perform" which automatically determines rights, where the Government would obtain unlimited rights in such data during the government contract, and where subcontractor's rights in technical data would be substantially eroded.

ATTACHMENT 2
JANUARY 31, 1991

5) Under 27.405-2(a)(5)(i) and (ii) of the ANPR, where the Government obtains a government purpose license right, that government purpose right is effective for only a specifically negotiated period of time, after which time the GPR rights expire and the government obtains unlimited rights. This is unsupported by practice and is unacceptable. There is no reason why GPR rights should change character merely because of the passage of time. Further, this "transformation" of rights in the information undercuts the prospects for commercializing technology.

6) Under 27.404(2)(b)(3) of the ANPR, even where the government obtains or agrees to accept limited rights, the ANPR dramatically expands the traditional interpretation of those limited rights (basically restricted to use within the Government) to permit disclosure to third parties for certain information purposes. We have no objection to the restricted disclosure for emergency purposes. In addition, while we have previously had no objection to the restricted disclosure for "routine" overhaul, we note that the term "routine" has been dropped from the ANPR. While this concept may have existed in the civilian agencies' version of the FAR, there is a specific prohibition on such disclosure applicable to the Department of Defense. This provision appears to be a substitute for the standard non-disclosure agreement in the current DFARS at 52.227-26. Under the ANPR, the government would have no obligation to notify the originator of the information. (See 27.404-4(a).) We object to the use of this policy formulation for any federal agency. We believe that any regulation must clearly recognize the statutory prohibition on release that is applicable to the Department of Defense (10 U.S.C. 2320) and provide at least some notice to the originator and the opportunity to protect that information before it is released. Further, it appears that government purpose rights are further limited in the ANPR to "detailed design, manufacturing and process data and computer software". We see no reason to so restrict the scope of GPR.

7) The ANPR is not forceful enough on the issue of the unnecessary acquisition of data. The ANPR policy statement at 27.402(c)(3) merely includes a sentence that "it is necessary to carefully review data needs to avoid the acquisition of unnecessary data." This naked statement in the ANPR does not even go to the next logical step to meet the clearly and repeatedly enunciated statement of federal officials that the Government shall not acquire data without a clearly identified need and then will only acquire the minimum essential information. All that is included is that the Government shall use the "least intrusive means".

8) The ANPR specifically requested comments on segregability. The background statement accompanying the ANPR properly notes the concerns about the determination of rights at the total product or systems level. 27.405-2(a) of the ANPR does adopt the requirement for segregability at the lowest practical identifiable level (a formulation that we can support if that statement recognizes, as we do and as do the boards and courts, that this may go down to the individual piece part and/or trade secret level).

9) The Defense Department statute specifically requires that rights in data pertaining to mixed funding development must be negotiated. Under 27.405-2(a)(3) of the ANPR, the Government will not be required to negotiate for rights in this area because the rule seems to unilaterally provide that data developed with mixed funding will be delivered with GPR rights. We agree that there should be a requirement in the FAR to negotiate rights for mixed funding.

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10) With respect to commercial products, we recognize that the issue of commercial products is an item that was specifically left open for further comment. The policy statement of the ANPR indicates that the government will accept the same rights as a commercial customer. We fully support that statement and that policy. However, the policy statement of the ANPR does not mention applying this same philosophy to any modification to a commercial product, regardless of the character of that modification. We believe that modifications to commercial products that maintain the commercial nature of the product should be treated, for purposes of data rights, in the same manner as the rights applicable to the original commercial product. Where the modification is for a unique government requirement, the Government would be entitled to certain rights in the information concerning the modification to that product.

11) Under the GPR section of the ANPR (27.404-4), it appears that the regulations allow (or at least do not discourage) the contracting officer to deny a request for government purpose rights, even though the Government may have use of such technical data for reprourement purposes. In effect, the contracting officer could deny the request for no reason and ask for unlimited rights instead, and leave the originator of the technical information without any recourse.

12) The administrative requirements for marking technical data and computer software seem overly complex in the ANPR. In fact, they appear more complex than the requirements under the current DFARS interim rule or, in our view, than necessary to accomplish the purposes of even the ANPR formulation of the regulation.

13) The ANPR does not even recognize a situation where the Government and the contractor may agree on the allocation of rights and then establish a binding legal determination of those rights. It is unclear whether relying on the procedures for identification of rights as provided for in 27.405 and the procedures for validation in 27.407 deal with the issue of the negotiation and agreement on the allocation of rights which the originator of the information cannot later "validate".

14) The entire issue of encouraging the commercialization of government-funded technology has either been mistreated or not treated in the ANPR. The ANPR ignores Presidential policy statements to limit the Government's rights in data to those essential for government needs by starting with the premise that the Government gets unlimited rights unless the contractor can sustain a nebulous requirement to restrict those rights. It appears that the request for commercialization is limited to prime contractors only and not even available to subcontractors who may be the "developer"/"originator" of the information (see, for example, 27.405-2(a) where the term used is "offeror", or when the Government gets unlimited rights where the term "contract" is used). The ANPR does not allow sufficient time for a contractor (and subcontractor?) to make the effort to commercialize the technology. Finally, the regulation fails to provide any protection or rewards (i.e. continued exclusivity/limited rights) to a contractor (or subcontractor?) who is successful in achieving that commercialization goal!

15) Within the ANPR there are new concepts and new terms introduced and used in the policy and clauses without explanation and without definition. These include the term "used" (sometimes with a modifier such as "specifically"), "furnished for use" and "furnished". Under the ANPR, the Government acquires unlimited rights in:

ATTACHMENT 2
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--form, fit and function data furnished for use in the contract;

performance of a government

--all other data required to be or in fact delivered or performance of this contract; and

furnished for use in the

--manuals and instructional materials furnished or required to be furnished.

This section includes software as well as "hardware". We believe that to retain these terms in this formulation would be contrary to the policy and the spirit of this regulation and could constitute a further imbalance of interests between the Government and the contractor. When coupled with emerging issues such as the Department of Defense initiatives in computer-aided acquisition and logistics support (CALS) or the Department's new data rights standard Mil-T-31000, this formulation becomes even more troublesome, as the expanded definitions put a larger portion of a contractor's technical information at risk. If these terms are to be retained in any future regulation, they must be carefully defined and should specifically exclude, at a minimum, detailed design and manufacturing information, source codes and other information that would enable a third party recipient to compile, recreate or reproduce the product or the software, except where there is exclusive funding by the government.

16) 27.404-4(g) prohibits copyright from being used along with GPR. We see no reason to prohibit both. The ANPR improperly presumes that the use of a copyright notice overrides limited rights markings on information.

17) Under 27.404-5(b) and (c) of the ANPR, the ownership and right to claim copyright in works first produced under a contract is subject to government discretion. We are concerned about the relationship between this provision and title 17, the U.S. copyright laws, and international copyright laws, under which the contractor or subcontractor always owns such intellectual property and the Government obtains a license of adequate scope. Even the DFARS at 227.480(c) recognizes the right of the contractor to copyright works first produced, except for "special works".

18) In the ANPR clause at 52.227.21, the phrase "to the best of its knowledge and belief" has been deleted from the certification. Without such qualification, an absolute certification for millions of items of information would be impossible. The phrase must be restored to the certification.

19) In the ANPR clause at 52.227-25(e) (with respect to the final decision when the contractor fails to respond to a challenge) and (f)(4) (contracting officer final decision), only fifteen days have been provided for a contractor to take advantage of administrative or judicial review. No justification or explanation has been provided for this change, and we are not aware of any justification or requirement for the change. The current ninety day standard is in current 52.227-24(g) of the FAR and 252.227-7037(f)(2) of the DFARS.

ATTACHMENT 3

- FINAL DRAFT -

INDUSTRY ASSOCIATION

PROPOSED REGULATION

**RIGHTS IN DELIVERABLE
TECHNICAL INFORMATION,
COMMERCIAL PRODUCTS
INFORMATION AND SOFTWARE**

DATED: JANUARY 31, 1991

- FINAL DRAFT -

INDUSTRY ASSOCIATION

PROPOSED REGULATION

(FINAL DRAFT)

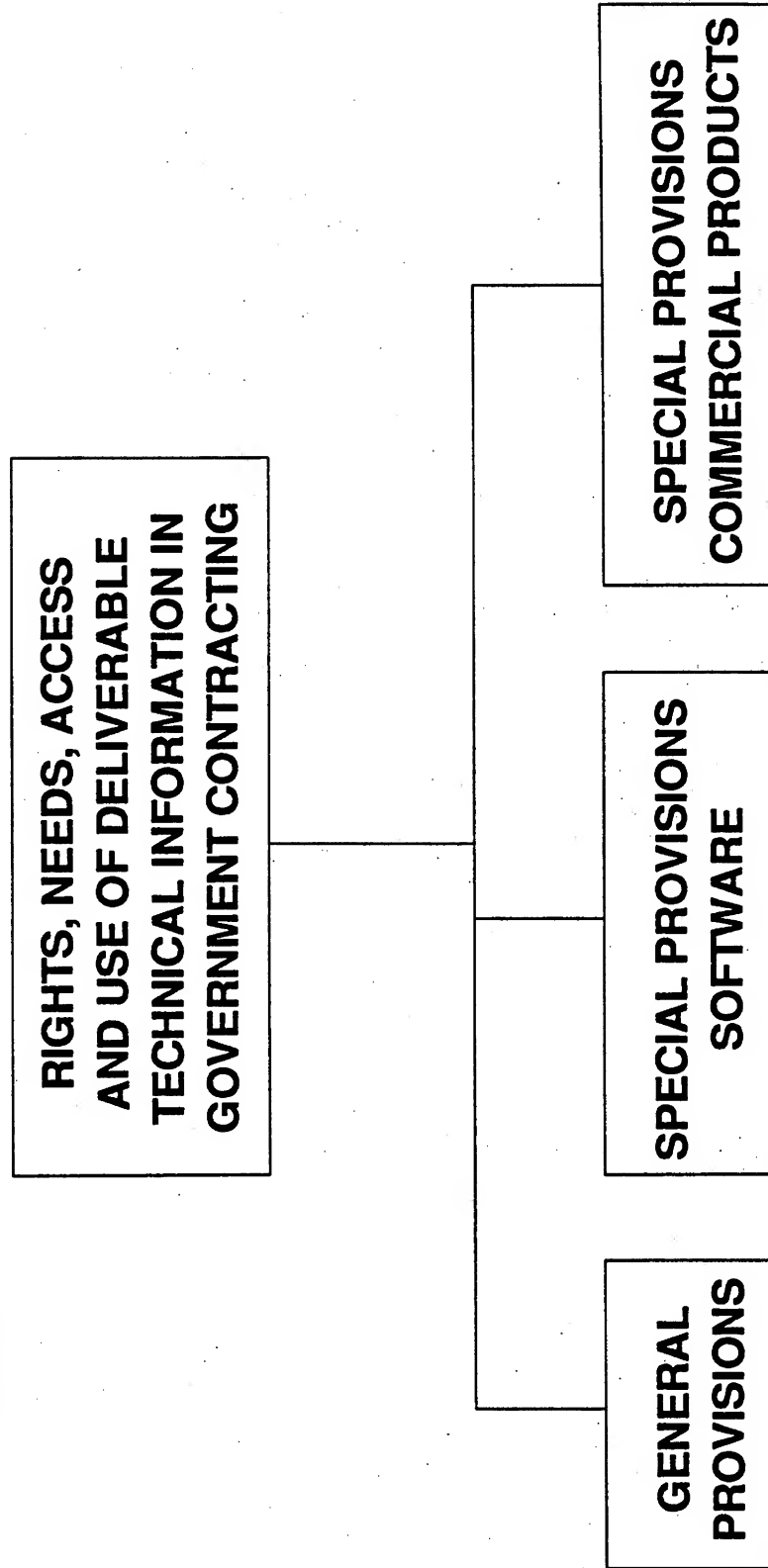
JANUARY 31, 1991

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NOTE: THIS INDUSTRY PROPOSED REGULATION DOES NOT ADDRESS THE REQUIREMENTS FOR (1) RIGHTS IN DATA - SBIR PROGRAM OR (2) RIGHTS IN DATA - SPECIAL SITUATIONS WHICH PROVIDE BASICALLY FOR NON-TECHNICAL DATA COVERAGE REGULATORY LANGUAGE FOR THESE SPECIALIZED SECTIONS SHOULD BE ADDRESSED AS A PART OF FINALIZING A REGULATION.

INDUSTRY ASSOCIATION - PROPOSED REGULATION

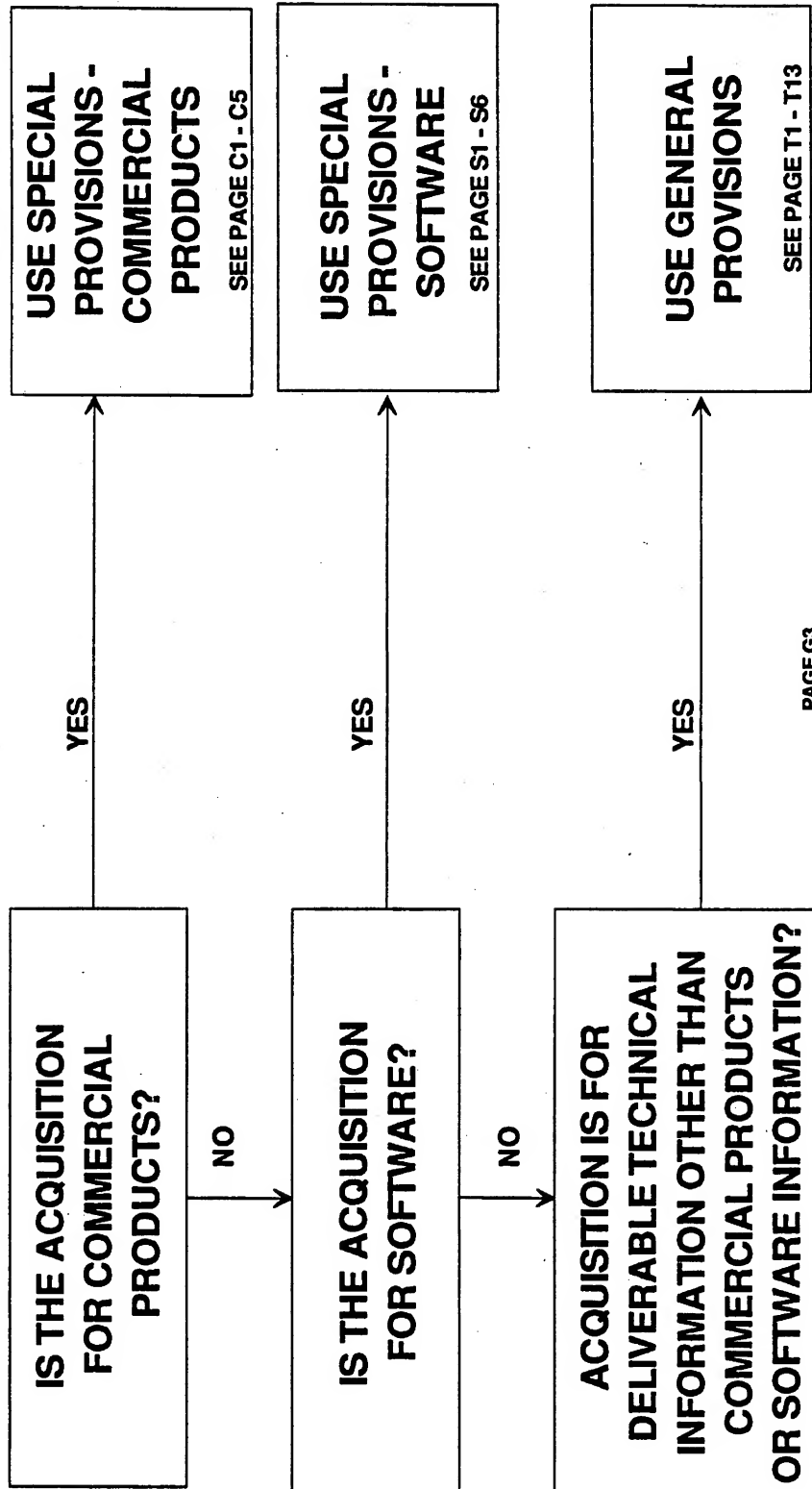


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INDUSTRY ASSOCIATION - PROPOSED REGULATION

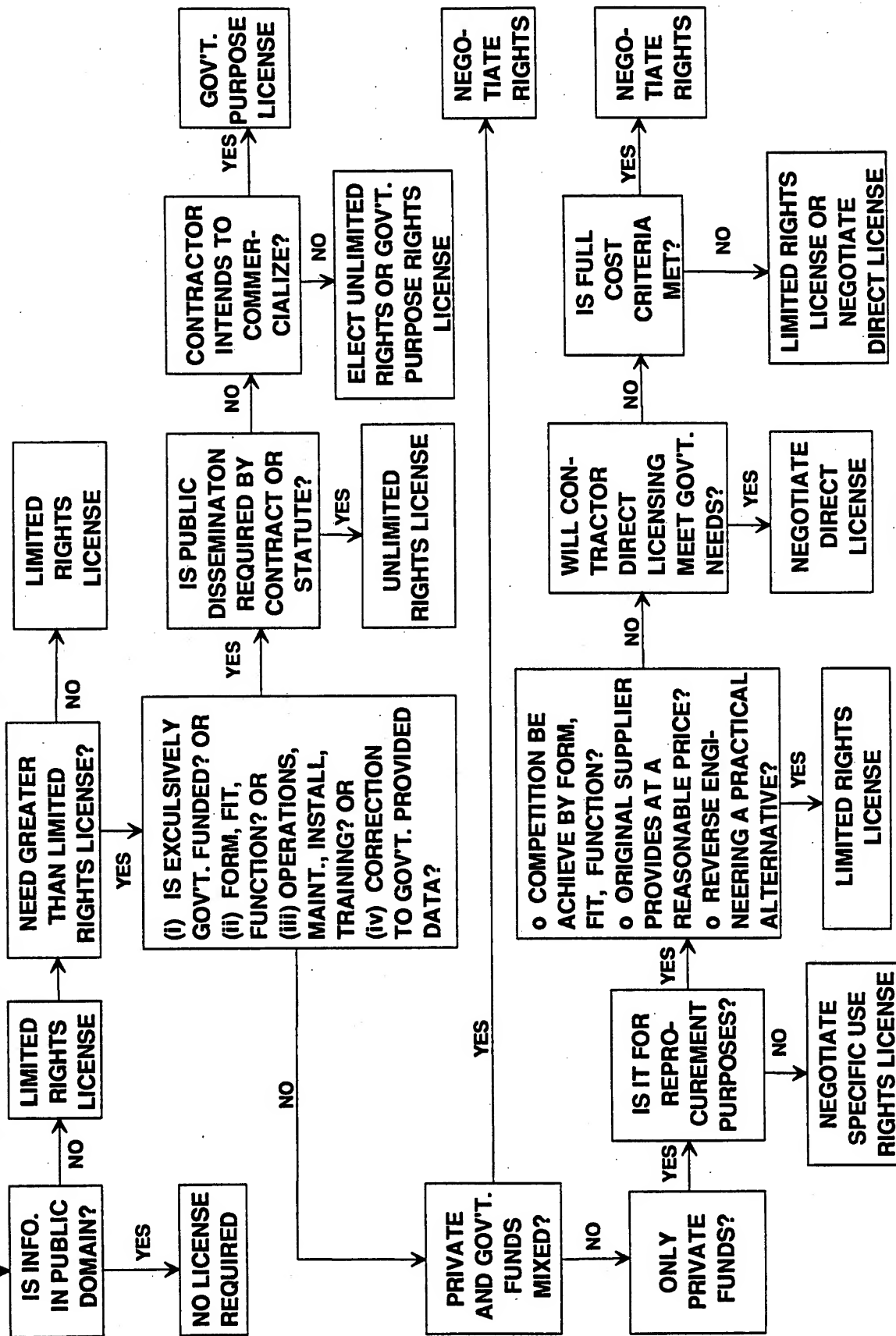
ALLOCATION OF RIGHTS IN DELIVERABLE TECHNICAL INFORMATION,
COMMERCIAL PRODUCTS INFORMATION AND SOFTWARE

USE TO DETERMINE APPROPRIATE PROVISION(S) TO USE IN CONTRACTING



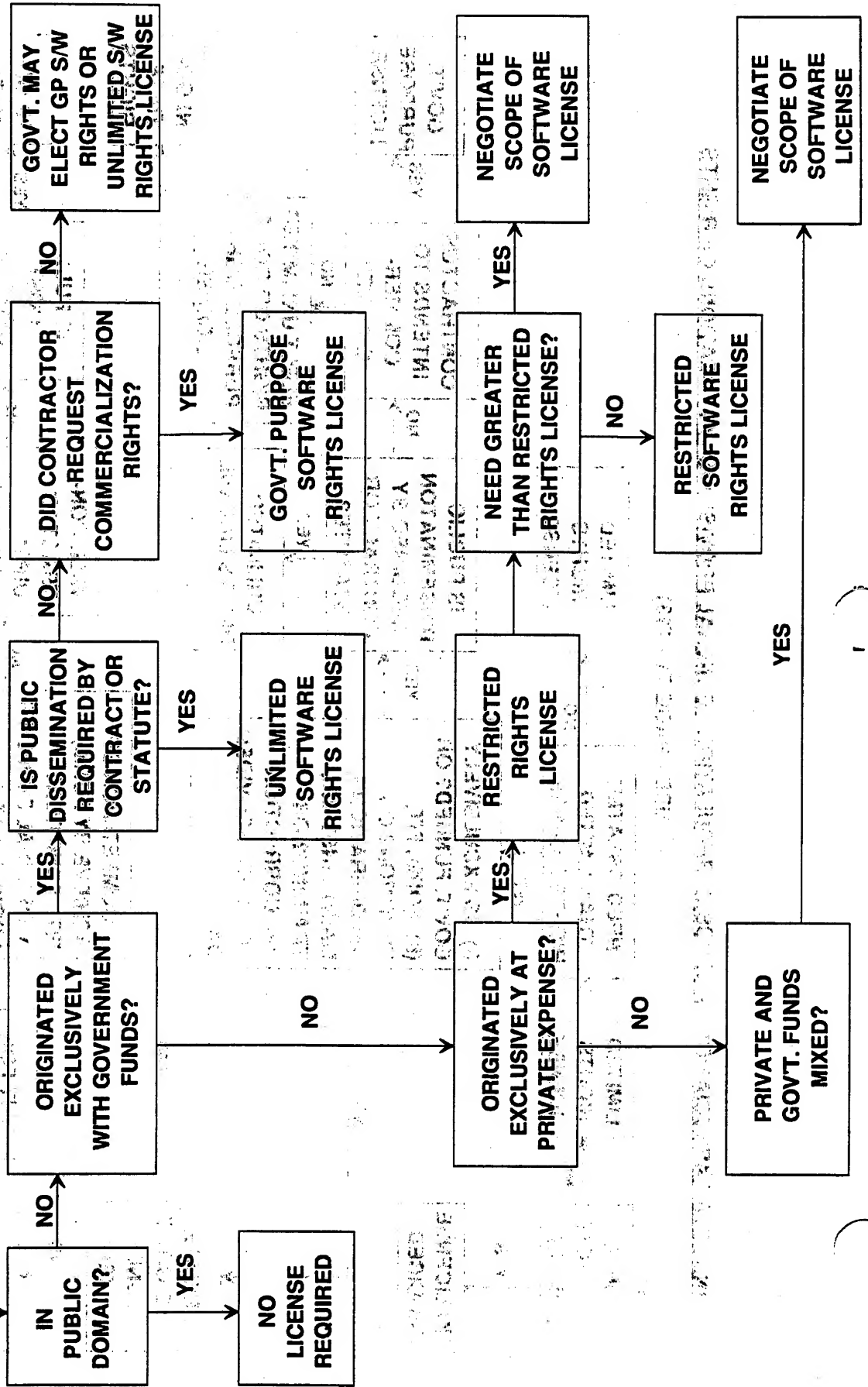
INDUSTRY ASSOCIATION - PROPOSED REGULATION - GENERAL PROVISIONS - ALLOCATIONS OF RIGHTS

(USE - PAGE T1 - T13)



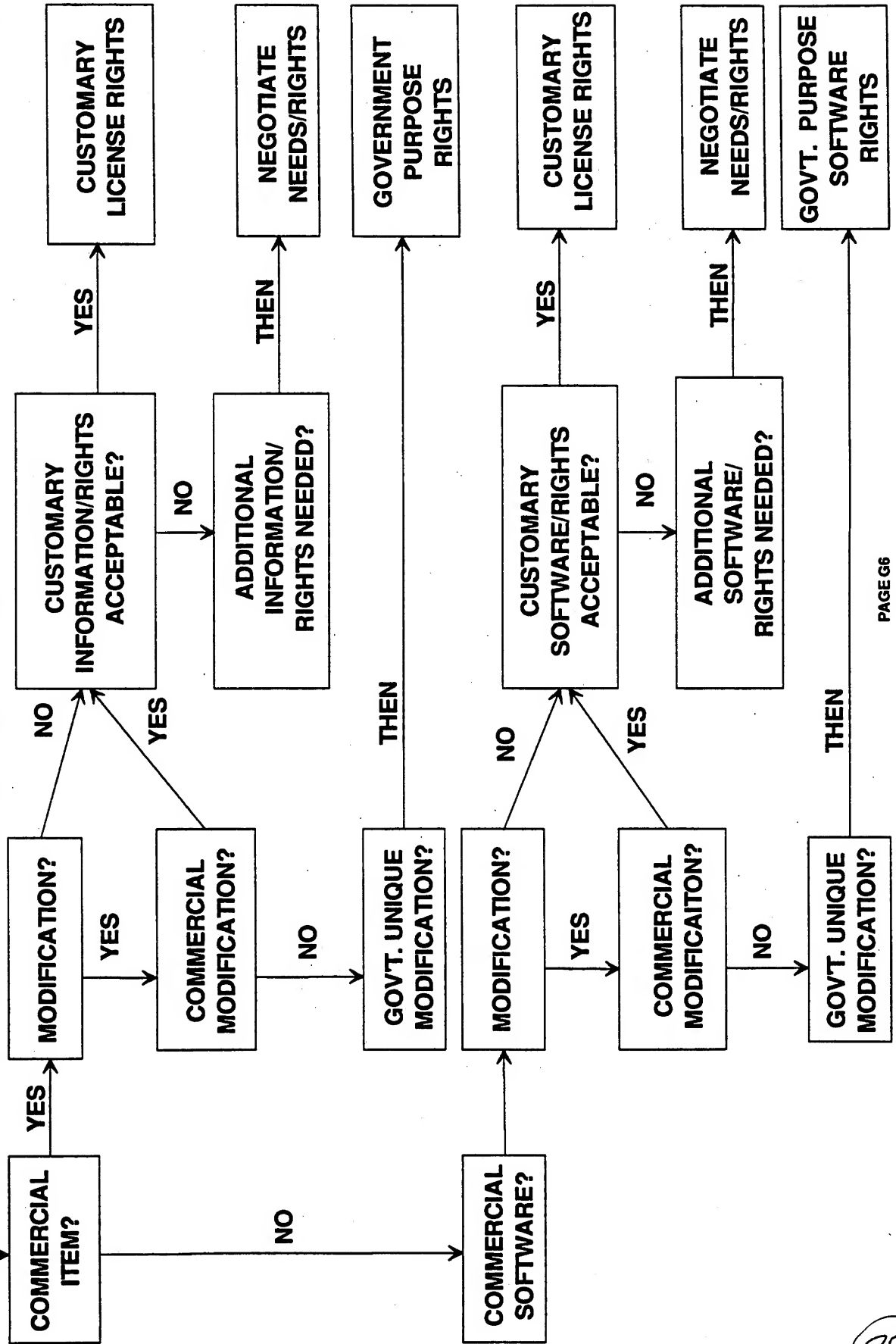
INDUSTRY ASSOCIATION - PROPOSED REGULATION - SPECIAL PROVISIONS - SOFTWARE ALLOCATION OF RIGHTS

(USE PAGE S1 - S6)



INDUSTRY ASSOCIATION - PROPOSED REGULATION - SPECIAL PROVISIONS - COMMERCIAL PRODUCTS

(USE PAGE C1 - C5)



**INDUSTRY ASSOCIATION
PROPOSED DRAFT REGULATION
(January 31, 1991)**

**DEPARTMENT OF DEFENSE (DOD)
GENERAL SERVICES ADMINISTRATION (GSA)
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION AGENCIES (NSA):**

27.400 Scope of subpart.

This subpart prescribes policies, procedures, and contract clauses for executive agencies with respect to the rights of the Government in, and the acquisition of, **DELIVERABLE TECHNICAL INFORMATION**. See 27.4TBDS for special provisions relating to **SOFTWARE**, and 27.4TBDC for **COMMERCIAL PRODUCTS**.

27.401 Policy.

It is the Government's policy to: (1) encourage private investment in technology; (2) promote commercialization of government-funded technologies; and (3) accept minimal rights in a developer's **DELIVERABLE TECHNICAL INFORMATION**.

(a) **Rights in DELIVERABLE TECHNICAL INFORMATION.** In consonance with the Government's policy, ownership of **DELIVERABLE TECHNICAL INFORMATION** and the Government's rights to use and disclose that information, are controlled by the originator, unless otherwise proscribed by statute.

(b) **Acquisition of DELIVERABLE TECHNICAL INFORMATION.** The Government has various needs for **DELIVERABLE TECHNICAL INFORMATION**. However, acquiring, maintaining, storing, retrieving, protecting, and distributing **DELIVERABLE TECHNICAL INFORMATION** are costly and burdensome to the Government. Therefore, it is the policy of the Government to acquire that **DELIVERABLE TECHNICAL INFORMATION** which meets its minimum essential needs. In doing so, the Government recognizes that the **TECHNICAL INFORMATION** pertaining to a **CONTRACTOR'S DESIGN AND MANUFACTURING SYSTEMS** represent valuable property which may be jeopardized by delivery. Therefore, the Government shall not normally acquire such as **DELIVERABLE TECHNICAL INFORMATION**.

(c) **Specific Acquisition of Greater Rights in DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE.** Innovation is encouraged by promoting effective competition between supplier's skills, products, capabilities, and price. The Contracting Officer shall assess alternative methods to the acquisition of greater rights in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE**, and identify and use the least intrusive method of competition when competition is required. If the Government does attempt to purchase greater than a **LIMITED RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE**, the Government shall pay fair value for such rights.

A **CONTRACTOR** (or a prospective **CONTRACTOR**) shall not be required, as a condition of being responsive to a solicitation or as a condition for the award of a **CONTRACT**, to sell or otherwise relinquish rights in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE**.

(d) Dissemination of DELIVERABLE TECHNICAL INFORMATION

(1) It is the policy of the Government to make available current, complete and accurate **DELIVERABLE TECHNICAL INFORMATION** to interested suppliers on a timely basis, provided the Government has a right to do so. Such **DELIVERABLE TECHNICAL INFORMATION** shall be made available to the suppliers in sufficient time to allow preparation and submission of a bid or proposal. Therefore the Government should, unless otherwise justified, contract with the owner of such **DELIVERABLE TECHNICAL INFORMATION** to:

(i) Serve as a repository for the **DELIVERABLE TECHNICAL INFORMATION**, and,

(ii) Provide the Government, upon written request, any and all such **DELIVERABLE TECHNICAL INFORMATION** under the terms of the **CONTRACT**.

(d)(2) When the Government has the right to use **DELIVERABLE TECHNICAL INFORMATION** for repurchase which was delivered under prior **CONTRACT**, and this **DELIVERABLE TECHNICAL INFORMATION** is not current,

complete, or accurate, for competitive reprourement purposes, or which may not be retrievable for timely distribution to potential suppliers, the Government should, unless otherwise justified, contract with the owner of such DELIVERABLE TECHNICAL INFORMATION to:

- (i) Update such DELIVERABLE TECHNICAL INFORMATION to meet reprourement requirements so that it is accurate, complete and kept current thereafter; and,
- (ii) Serve as a repository for future government needs for access to such DELIVERABLE TECHNICAL INFORMATION.

27.402 Definitions.

CONTRACT means, for the purposes of this subpart, the contract or subcontract with the entity who owns the DELIVERABLE TECHNICAL INFORMATION provided under this contract or subcontract.

CONTRACTOR means, for purposes of this subpart, the contractor or subcontractor who owns the DELIVERABLE TECHNICAL INFORMATION provided under this CONTRACT.

DELIVERABLE TECHNICAL INFORMATION means TECHNICAL INFORMATION contained in documents or other media required to be delivered to the Government under the CONTRACT.

DESIGN AND MANUFACTURING SYSTEMS means systems including processes used by a CONTRACTOR in the design of products or processes, or in the manufacture of products.

DETAILED DESIGN, MANUFACTURING, OR PROCESS INFORMATION means TECHNICAL INFORMATION pertaining to reproduction, or manufacture, of an item, component, or the performance of a process.

FORM, FIT, AND FUNCTION INFORMATION, means TECHNICAL INFORMATION relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as information identifying source(s), size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

GOVERNMENT PURPOSE RIGHTS shall mean the right to use, duplicate, and disclose DELIVERABLE TECHNICAL INFORMATION are as set forth in the GOVERNMENT PURPOSE RIGHTS Notice of (c)(2) of this clause.

LIMITED RIGHTS shall mean the right to use, duplicate, and disclose DELIVERABLE TECHNICAL INFORMATION are as set forth in the LIMITED RIGHTS Notice of (b) of this clause.

ORIGINATED means that the TECHNICAL INFORMATION has been set down in a tangible medium of expression for the first time for the purpose of recording.

ORIGINATED AT PRIVATE EXPENSE in connection with DELIVERABLE TECHNICAL INFORMATION means that no part of the cost of origination of the DELIVERABLE TECHNICAL INFORMATION was charged as a direct charge to the Government, with the express understanding that independent research and development and bid and proposal costs, as defined in 31.205-18 (whether or not included in a formal independent research and development program), and costs allocated to overhead accounts in accordance with the Cost Accounting Standards (CAS) for those CONTRACTS covered by CAS, or in accordance with generally accepted accounting principles for those CONTRACTS not covered by CAS, are not to be considered origination costs charged to the Government for purposes of this definition.

ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS in connection with DELIVERABLE TECHNICAL INFORMATION, means that the cost of origination of the DELIVERABLE TECHNICAL INFORMATION was paid for in whole by the Government. Independent research and development and bid and proposal costs, as defined in 31.205-18 (whether or not included in a formal independent research and development program), and costs allocated to overhead accounts in accordance with the Cost Accounting Standards (CAS) for those CONTRACTS covered by CAS, are not to be considered origination costs charged to the Government for purposes of this definition.

ORIGINATED WITH MIXED FUNDS means the DELIVERABLE TECHNICAL INFORMATION is not capable of being separated into DELIVERABLE TECHNICAL INFORMATION ORIGINATED EXCLUSIVELY WITH

GOVERNMENT FUNDS or DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE. Separation of the DELIVERABLE TECHNICAL INFORMATION shall take place at the lowest identifiable level.

SPECIFIC USE RIGHTS means rights, negotiated between the CONTRACTOR and the Government, to use and/or disclose the DELIVERABLE TECHNICAL INFORMATION for specific Government purposes other than procurement.

TECHNICAL INFORMATION means information of an engineering or scientific nature, recorded in any form, on any media, or using any method of recording. The term, for the purposes of this subpart, does not include SOFTWARE.

UNLIMITED RIGHTS, in connection with DELIVERABLE TECHNICAL INFORMATION, means that the CONTRACTOR shall not attempt to limit the Government's right to use, duplicate, and disclose such DELIVERABLE TECHNICAL INFORMATION, prepare derivative works of the DELIVERABLE TECHNICAL INFORMATION, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.403 Rights in DELIVERABLE TECHNICAL INFORMATION --General

(a) The CONTRACTOR owning the DELIVERABLE TECHNICAL INFORMATION shall grant the Government those license rights as set forth this Subpart. The scope of the license rights shall be determined by:

(1) the source of funding for the origination of each SEGREGABLE portion of such DELIVERABLE TECHNICAL INFORMATION;

(2) negotiation; and/or

(3) election by the Government under the circumstances set forth in 27.404.

27.404 Rights in DELIVERABLE TECHNICAL INFORMATION

27.404-1 Instructions for Determining the Scope of License Rights

(a) Under the rights in DELIVERABLE TECHNICAL INFORMATION clause at 52.227-14, and except for TECHNICAL INFORMATION in the public domain, the CONTRACTOR shall grant the Government a LIMITED RIGHTS license in all DELIVERABLE TECHNICAL INFORMATION, unless the Contracting Officer determines that the Government needs to obtain a greater than LIMITED RIGHTS license, and has the authority to elect or receive such license in accordance with the instructions set forth in (b)(1)-(6) below.

(b)(1) The Government may unilaterally elect, subject to (b)(2), to receive a GOVERNMENT PURPOSE RIGHTS license, an UNLIMITED RIGHTS license, or a SPECIFIC USE RIGHTS license in DELIVERABLE TECHNICAL INFORMATION if a needs justification is documented by the Contracting Officer and if the DELIVERABLE TECHNICAL INFORMATION:

(i) was ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS and which is the result of experimental, research, or developmental work specified as an element of performance under the CONTRACT with the originator; or

(ii) is FORM, FIT AND FUNCTION INFORMATION; or

(iii) is necessary for the installation, operation, maintenance and repair or training with respect to items, components, or processes delivered under the CONTRACT (other than DETAILED DESIGN, MANUFACTURING OR PROCESS INFORMATION); or

(iv) constitutes a correction or change by the CONTRACTOR to TECHNICAL INFORMATION furnished to the CONTRACTOR by the Government.

(b)(2) The Government shall not elect to receive an UNLIMITED RIGHTS license in the DELIVERABLE TECHNICAL INFORMATION described above in (b)(1)(i)-(iv) if the CONTRACTOR originating the DELIVERABLE TECHNICAL INFORMATION requests that the Government elect to receive a GOVERNMENT PURPOSE RIGHTS license. Such request must include a positive statement of intent to use the DELIVERABLE TECHNICAL INFORMATION for a commercial purpose. The CONTRACTOR'S request shall be granted, unless the DELIVERABLE TECHNICAL

INFORMATION must be disseminated to the public by virtue of clear statutory requirements or pertains to basic research undertaken for the purpose of public dissemination. If the **CONTRACTOR** cannot demonstrate that it has made a positive attempt to use such **DELIVERABLE TECHNICAL INFORMATION** commercially within a negotiated period of time, which is in no case less than two (2) years, after **CONTRACT** completion date, the Government shall receive an **UNLIMITED RIGHTS** license in such uncommercialized **DELIVERABLE TECHNICAL INFORMATION**.

(b)(3) The Government may negotiate to be granted a greater than **LIMITED RIGHTS** license, including **SPECIFIC USE RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED WITH MIXED FUNDS**.

(b)(4) The Government may negotiate to buy a **SPECIFIC USE RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE** for other than reprourement purposes.

(b)(5) For reprourement purposes, the Government shall not seek to acquire a greater than **LIMITED RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE** if:

(i) a functionally interchangeable substitute is available, or competition can be achieved through the use of performance specifications, **FORM, FIT, OR FUNCTION INFORMATION**; or

(ii) the original supplier will supply the anticipated volume at a reasonable price, or

(iii) reverse engineering is a practical alternative.

(iv) If options (i)-(iii) are not available, the Contracting Officer shall choose the least intrusive and most cost effective means of reprourement, including, for example, direct licensing of other potential competitive supply sources by the **CONTRACTOR** to use the **DELIVERABLE TECHNICAL INFORMATION** to supply the item, component or process to the Government.

(v) Only if the Government determines that it is unable to meet its needs by using the procedures of (i)-(iv), should the Government attempt to acquire a greater than **LIMITED RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION**. The Government should assess whether the expected savings on a life cycle cost basis from meeting the Government's clearly specified objectives through such an acquisition are likely to exceed:

(A) The full cost including the acquisition of such rights in **DELIVERABLE TECHNICAL INFORMATION** and other additional costs to the Government; and

(B) The full costs of other alternatives (identified in consultation with the **CONTRACTOR**) that may meet the specified performance objectives.

(vi) If the expected savings do not exceed the full costs for an alternative, the Government should not acquire such greater rights in **DELIVERABLE TECHNICAL INFORMATION**.

(b)(6) The Government shall not require the **CONTRACTOR** to grant greater rights in a subcontractor's **DELIVERABLE TECHNICAL INFORMATION** than the rights set forth in (a) and (b)(1) without the express consent of the subcontractor.

(b)(7) The Government shall receive an **UNLIMITED RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION** which has been disclosed by the **CONTRACTOR** without restriction on further disclosure or use, or which is in the public domain.

(c)(1) The Contracting Officer shall, as appropriate for each **CONTRACT**, negotiate requirements for delivery of lists, or compilations of documents or other media containing **DELIVERABLE TECHNICAL INFORMATION** for which the Government will receive less than an **UNLIMITED RIGHTS** license. The timing and content of such listings shall be tailored for the particular **CONTRACT** and may include, for example, a listing of document identifiers, a corresponding description of the scope of the license to be granted, an indication of the Government's outstanding election of right **CONTRACTOR'S** intent to commercialize, etc.

(c)(2) Listings and contractual agreements to list prepared and delivered pursuant to this requirement shall not:

(i) affect the determination of rights in the **DELIVERABLE TECHNICAL INFORMATION**;

(ii) abridge the Instruction at 27.404 1(b)(6).

(c)(3) CONTRACTOR may unilaterally amend the list until rights in all DELIVERABLE TECHNICAL INFORMATION have been determined.

27.404-2 Marking of DELIVERABLE TECHNICAL INFORMATION

(a) The clause at 52.227-14 enables the CONTRACTOR to protect DELIVERABLE TECHNICAL INFORMATION for which the Government is granted a LIMITED RIGHTS or GOVERNMENT PURPOSE RIGHTS license. This protection is achieved by either marking such DELIVERABLE TECHNICAL INFORMATION with a prescribed LIMITED RIGHTS notice or with a GOVERNMENT PURPOSE RIGHTS notice when delivered to the Government.

(b) The scope of the license rights acquired by the Government is set forth in the appropriate rights notice in (b) and (c)(2) of the clause at 52.227-14.

27.404-5 Copyrights

(a) A CONTRACTOR originating DELIVERABLE TECHNICAL INFORMATION under or in connection with a Government CONTRACT may retain and claim all the exclusive rights the copyright law, Title 17 U.S.C., gives. Notwithstanding the foregoing, the Government shall have the same right and license to use, disclose, distribute, and reproduce the DELIVERABLE TECHNICAL INFORMATION as granted under 52.227-14.

(b) The CONTRACTOR shall, as appropriate, affix the applicable copyright notice of 17 U.S.C. 401 or 402 and an acknowledgement of Government sponsorship (including the CONTRACT number) to the DELIVERABLE TECHNICAL INFORMATION. Such notice may include the term "Unpublished Work" or such other notice as appropriate.

(c) The CONTRACTOR shall not include the works of others containing the notice of 17 U.S.C. 401 or 402 in DELIVERABLE TECHNICAL INFORMATION without first obtaining a license from the owner of such work commensurate in scope with the license granted by the CONTRACTOR in such DELIVERABLE TECHNICAL INFORMATION.

(d) The Government agrees to include any copyright notice on any reproduction or derivative work made of the DELIVERABLE TECHNICAL INFORMATION by the Government.

27.404-6 Release, publication and use of DELIVERABLE TECHNICAL INFORMATION

The Government shall not disclose DELIVERABLE TECHNICAL INFORMATION with a GOVERNMENT PURPOSE RIGHTS notice to non-Governmental entities without an appropriate Nondisclosure Agreement per 52.227-26, provided, however, the Government has the rights to so disclose the DELIVERABLE TECHNICAL INFORMATION.

27.404-7 CONTRACTOR licensing.

A CONTRACTOR may not be prohibited from receiving from a third party a fee or royalty for the use of DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE by the CONTRACTOR except as otherwise specifically provided by law.

[27.406(e) Specialized subject area, ANPR treatment probably fair in view of current SBA directive]

27.407 Omitted, nonconforming and unauthorized markings.

27.407-1 Omitted and nonconforming markings.

(a) DELIVERABLE TECHNICAL INFORMATION delivered under a CONTRACT containing the clause at 52.227-14, Rights in DELIVERABLE TECHNICAL INFORMATION, without appropriate notices, or without a copyright notice, will be presumed to have been delivered with an UNLIMITED RIGHTS license per 52.227-14(d), and the Government assumes no liability for the disclosure, use, or reproduction of such DELIVERABLE TECHNICAL INFORMATION. However, to the extent the DELIVERABLE TECHNICAL INFORMATION has not been disclosed, the CONTRACTOR may within 6 months (or longer period in accordance with agency procedures), request permission of the Contracting

Officer to have omitted notices placed on qualifying DELIVERABLE TECHNICAL INFORMATION, at the CONTRACTOR'S expense. The Contracting Officer shall agree to so permit if the CONTRACTOR --

- (1) Identifies the DELIVERABLE TECHNICAL INFORMATION for which notice is to be added;
- (2) Establishes that the use of the notice is authorized; and
- (3) Acknowledges that the Government has no liability with respect to any disclosure or use of any such DELIVERABLE TECHNICAL INFORMATION made prior to the addition of the notice or resulting from the omission of the notice.

(b) If the DELIVERABLE TECHNICAL INFORMATION appears to be DELIVERABLE TECHNICAL INFORMATION that the CONTRACTOR is authorized to mark, but the notice is nonconforming, then the Government may notify the CONTRACTOR and use the DELIVERABLE TECHNICAL INFORMATION as if the notice were proper. The CONTRACTOR shall be required to correct the notices to conform to the CONTRACT. Nonconforming means notices which appear to assert rights in DELIVERABLE TECHNICAL INFORMATION, but do not conform to the prescribed notices authorized by the clause at 52.227-14, Rights in DELIVERABLE TECHNICAL INFORMATION. If the CONTRACTOR fails to correct the notices within 60 days after notice from the Contracting Officer, the Government may correct the notices at the CONTRACTOR'S expense. Since interpretation of nonconforming notices is judgmental by the Government, the CONTRACTOR should not assume that such notices are adequate to protect rights.

27.407-2 Unauthorized notices and validation.

(a) Except as provided in 27.407-2(b), the Contracting Officer may challenge the Contractor's or Subcontractor's use of restrictive notices contained in if the Contracting Officer has a reasonable basis to believe that:

- (1) grounds exist to question the validity of the challenged restrictive notices; and
- (2) continued adherence by the United States Government to the obligations created by the restrictive notice would make it impracticable to procure the item or component or to practice the process to which the DELIVERABLE TECHNICAL INFORMATION bearing the restrictive notices pertain competitively at a later time.

(b) The Contracting Officer may at any time, enter into an agreement with a CONTRACTOR regarding restrictions on the Government to use, duplicate, or disclose DELIVERABLE TECHNICAL INFORMATION.

(c) The clause at 52.227-24, Validation of Restrictive Notices on DELIVERABLE TECHNICAL INFORMATION establishes the procedures for validation of restrictive notices on DELIVERABLE TECHNICAL INFORMATION. Restrictive notices placed on DELIVERABLE TECHNICAL INFORMATION pursuant to 27.407-2(b) shall not be subject to validation or challenge.

(d) In order to comply with the statutory requirements of 10 U.S.C. 2321, the following also applies to any challenges made pursuant to the clause at 52.227-24:

(1) The Contracting Officer, after consulting with the activity having an interest in the validity of the restrictive notices, must determine, after reviewing all available information, that there are reasonable grounds to question the validity of a restrictive notice, and that continued adherence to the restriction would make subsequent competition impracticable. The Contracting Officer must document this determination for the file.

(2) Restrictive notices must be challenged no later than 3 years after delivery of the DELIVERABLE TECHNICAL INFORMATION to the Government, or 3 years after final payment under the CONTRACT, whichever is later. The Contracting Officer may challenge a restrictive notice at any time if the DELIVERABLE TECHNICAL INFORMATION

- (i) Is publicly available without disclosure restrictions;
- (ii) Has been delivered to the Government without restriction; or
- (iii) Has otherwise been made publicly available without restriction.

27.408 Acquisition of DELIVERABLE TECHNICAL INFORMATION

The Government should contract for the delivery of the minimum amount of DELIVERABLE TECHNICAL INFORMATION required to fulfill its essential needs. The Government shall not require DELIVERABLE TECHNICAL INFORMATION pertaining to CONTRACTOR'S DESIGN AND MANUFACTURING SYSTEMS unless the development of the DESIGN AND MANUFACTURING SYSTEM is the purpose of the CONTRACT. The DELIVERABLE TECHNICAL INFORMATION requirements should, to the extent practicable, be included in solicitations. To minimize the expense to the Government of storing and handling DELIVERABLE TECHNICAL INFORMATION, it is preferable for the Government to contract with the owners of DELIVERABLE TECHNICAL INFORMATION to act as the repository for DELIVERABLE TECHNICAL INFORMATION during CONTRACT performance.

(a) A negotiated list of any DELIVERABLE TECHNICAL INFORMATION shall be included in the CONTRACT. Subcontractors may elect to deliver such DELIVERABLE TECHNICAL INFORMATION directly to the Government instead of the prime contractor.

(b) The CONTRACT DELIVERABLE TECHNICAL INFORMATION requirements list shall specify delivery location and dates, if established, and shall include a line item price for such DELIVERABLE TECHNICAL INFORMATION, and/or for CONTRACTOR repository services.

(c) Delivery requirements or the method of delivery shall not affect the determination of rights in the DELIVERABLE TECHNICAL INFORMATION. However, the CONTRACTOR may negotiate with the Government or higher-tier CONTRACTOR to withhold from delivery DELIVERABLE TECHNICAL INFORMATION otherwise specified for delivery, when it contains trade secrets and the CONTRACTOR is not required to grant the Government a greater than LIMITED RIGHTS license in such DELIVERABLE TECHNICAL INFORMATION pursuant to 27.404-1.

(d) The Government may elect to defer delivery of any or all DELIVERABLE TECHNICAL INFORMATION (for example, because the anticipated use date for the information has not been established, or the CONTRACTOR has contracted to act as a repository).

27.410 Solicitation provisions and CONTRACT clauses.

(a) The Contracting Officer shall insert the clause at 52.227-14, Rights in DELIVERABLE TECHNICAL INFORMATION, if DELIVERABLE TECHNICAL INFORMATION will be required under the CONTRACT.

(b) The clause at 52.227-24, Validation of Restrictive Notices on DELIVERABLE TECHNICAL INFORMATION, sets forth rights and procedures pertaining to validation of restrictive notices placed on DELIVERABLE TECHNICAL INFORMATION by CONTRACTORS. This clause shall be placed in CONTRACTS that require DELIVERABLE TECHNICAL INFORMATION to which the clause at 52.227-14, Rights in DELIVERABLE TECHNICAL INFORMATION applies.

(c) The clause at 52.227-26, Standard Non disclosure Agreement, shall be used when the Contracting Officer determines that the Government will receive a GOVERNMENT PURPOSE RIGHTS license in DELIVERABLE TECHNICAL INFORMATION under the CONTRACT.

(d) The Contracting Officer shall insert the clause at 52.227-21, Conformity of DELIVERABLE TECHNICAL INFORMATION, in all CONTRACTS having 52.227-14, to provide the Government with assurances the DELIVERABLE TECHNICAL INFORMATION conforms with all requirements of the CONTRACT concerning DELIVERABLE TECHNICAL INFORMATION.

(e) In accordance with 27.402(d) the clause at 52.227-101 shall be used.

PART 52 -- SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.227-14 Rights in DELIVERABLE TECHNICAL INFORMATION

The Contracting Officer shall use this clause in accordance with Subpart 27.400, when the Government specifies DELIVERABLE TECHNICAL INFORMATION. Clauses (a) and (b) shall be included in all CONTRACTS which specify DELIVERABLE TECHNICAL INFORMATION. Clauses (c)-(h) may be included by the Government, or CONTRACTOR as appropriate under FAR subpart 27.404.

Rights in DELIVERABLE TECHNICAL INFORMATION (XXX 1990)

(a) Definitions, See 27.401(a)

(b) CONTRACTOR grants to the Government a non-royalty bearing LIMITED RIGHTS license in DELIVERABLE TECHNICAL INFORMATION unless the CONTRACTOR has granted the Government a greater than LIMITED RIGHTS license as specifically provided in the following paragraphs. Documents or other media containing such DELIVERABLE TECHNICAL INFORMATION shall be identified with a LIMITED RIGHTS notice. Segregable portions of DELIVERABLE TECHNICAL INFORMATION contained in a document or other medium may be circled, underlined, or otherwise delineated for identification purposes.

"LIMITED RIGHTS Notice

(A) CONTRACT No. CONTRACTOR (XXXX)

(B) LIMITED RIGHTS -The Government has a license to:

(1) internally use this DELIVERABLE TECHNICAL INFORMATION, disclose this DELIVERABLE TECHNICAL INFORMATION to Government personnel, reproduce a reasonable number of copies of the records of this DELIVERABLE TECHNICAL INFORMATION in connection with the Government's use of this DELIVERABLE TECHNICAL INFORMATION for any internal Government use other than design or manufacture, and

(2) disclose this DELIVERABLE TECHNICAL INFORMATION to entities outside the Government only for the following purposes, provided the Government makes such disclosure to such non-Government entity subject to prohibition against further use and disclosure by that entity and the Government notifies the CONTRACTOR of the use or disclosure:

(i) For emergency repair and overhaul.

(ii) For evaluational or informational purposes to a foreign government or agency thereof (other than DETAILED DESIGN, MANUFACTURING, OR PROCESS INFORMATION) as the interests of the United States may require.

This notice shall be marked on any reproduction of this information, in whole or in part."

(End of notice)

(c) [May be used when the Government will receive a GOVERNMENT PURPOSE RIGHTS license in DELIVERABLE TECHNICAL INFORMATION under a CONTRACT]

CONTRACTOR grants to the Government a nonexclusive, royalty-free, worldwide GOVERNMENT PURPOSE RIGHTS license in such DELIVERABLE TECHNICAL INFORMATION as listed in (1) and (2) below. Documents or other media containing such DELIVERABLE TECHNICAL INFORMATION shall be identified with a GOVERNMENT PURPOSE RIGHTS notice. Segregable portions of DELIVERABLE TECHNICAL INFORMATION contained in a document or other medium may be circled, underlined, or otherwise delineated for identification purposes.

(1) DELIVERABLE TECHNICAL INFORMATION in which the Government may elect to receive greater than LIMITED RIGHTS per FAR subpart 27.404, is specified below:

(i) DELIVERABLE TECHNICAL INFORMATION ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS and which is the result of experimental, research, or developmental work specified as an element of performance under the CONTRACT with the originator; or

(ii) FORM, FIT, AND FUNCTION INFORMATION; or

(iii) DELIVERABLE TECHNICAL INFORMATION necessary for the installation, operation, maintenance and repair or training with respect to items, components or processes delivered under this CONTRACT (other than DETAILED DESIGN, MANUFACTURING, OR PROCESS INFORMATION); or

(iv) DELIVERABLE TECHNICAL INFORMATION that constitutes a correction or change by the CONTRACTOR to TECHNICAL INFORMATION furnished to the CONTRACTOR by the Government; and/or

(2) DELIVERABLE TECHNICAL INFORMATION which was ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS and which the CONTRACTOR has expressed the intent to use for a commercial purpose. If, after [insert agreed time period, in no case less than two years after CONTRACT completion date] the CONTRACTOR has not made a positive attempt to use the DELIVERABLE TECHNICAL INFORMATION for a commercial purpose, the Government shall be granted an UNLIMITED RIGHTS license in such DELIVERABLE TECHNICAL INFORMATION.

"GOVERNMENT PURPOSE RIGHTS Notice

(A) CONTRACT No. XXXX CONTRACTOR: XXXX

(B) GOVERNMENT PURPOSE RIGHTS. The Government has a license to: use, duplicate, and disclose this DELIVERABLE TECHNICAL INFORMATION, by or on behalf of the Government, including disclosure to a non-Government entity for any Government purpose, provided the Government makes such disclosure by such non-Government entity subject to prohibition against further use and disclosure by that entity and the Government or the non-Government entity notifies the CONTRACTOR of the use or disclosure:

This notice shall be marked on any reproduction of this DELIVERABLE TECHNICAL INFORMATION, in whole or in part."

(End of notice)

(d)[The following paragraph may be used when the Government will receive an UNLIMITED RIGHTS license in DELIVERABLE TECHNICAL INFORMATION under a CONTRACT.]

CONTRACTOR grants to the Government an UNLIMITED RIGHTS license in DELIVERABLE TECHNICAL INFORMATION as listed below and which is not marked with a notice designating another type of license right:

(1) DELIVERABLE TECHNICAL INFORMATION in which the Government may elect to receive an UNLIMITED RIGHTS license, per FAR subpart 27.404, is specified below:

(i) DELIVERABLE TECHNICAL INFORMATION ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS and which is the result of experimental, research, or developmental work specified as an element of performance under the CONTRACT with the originator, and which the CONTRACTOR has not identified as DELIVERABLE TECHNICAL INFORMATION to be used for a commercial purpose pursuant to (c)(2); or

(ii) FORM, FIT, AND FUNCTION INFORMATION;

(iii) DELIVERABLE TECHNICAL INFORMATION necessary for the installation, operation, maintenance and repair for training with respect to items, components or processes delivered under this CONTRACT other than DETAILED DESIGN, MANUFACTURING OR PROCESS INFORMATION;

(iv) DELIVERABLE TECHNICAL INFORMATION that constitutes a correction or change by the CONTRACTOR to TECHNICAL INFORMATION furnished to the CONTRACTOR by the Government; and/or

(v) DELIVERABLE TECHNICAL INFORMATION which has been disclosed without further restriction on its use or further disclosure or is in the public domain.

(e)[The following paragraph may be used when the Government will receive DELIVERABLE TECHNICAL INFORMATION ORIGINATED WITH MIXED FUNDS under a CONTRACT.]

CONTRACTOR agrees to negotiate the grant of license rights to the Government in DELIVERABLE TECHNICAL INFORMATION ORIGINATED WITH MIXED FUNDS. The license negotiated may be a LIMITED RIGHTS license, a GOVERNMENT PURPOSE RIGHTS license, an UNLIMITED RIGHTS license, or a license of any other scope acceptable to both parties.

(f) [The following paragraph may be used when the Government will receive a SPECIFIC USE RIGHTS license in DELIVERABLE TECHNICAL INFORMATION under a CONTRACT.]

The Government has negotiated SPECIFIC USE RIGHTS in certain DELIVERABLE TECHNICAL INFORMATION ORIGINATED AT PRIVATE EXPENSE. CONTRACTOR agrees to grant the Government a license to [specifically describe the field of use or scope of agreed license, for example, "Escrow DELIVERABLE TECHNICAL INFORMATION under specified conditions", "grant or sell use rights for routine overhaul and maintenance"] in such DELIVERABLE TECHNICAL INFORMATION, which shall be identified by an appropriate notice.

(g) The following paragraph may be used when the Government will receive copyrightable DELIVERABLE TECHNICAL INFORMATION under a CONTRACT.]

Copyright. (1) DELIVERABLE TECHNICAL INFORMATION which the CONTRACTOR has a right to protect under the Copyright statute 17-U.S.C. 401 or 402 may be marked with the applicable copyright notice, including the term "Unpublished Work", as appropriate, and an acknowledgement of Government sponsorship (including the CONTRACT number).

(2) The CONTRACTOR shall not include the works of others containing the notice of 17-U.S.C. 401 or 402 in DELIVERABLE TECHNICAL INFORMATION without first obtaining a license from the owner of such copyrighted work commensurate in scope to the license granted by the CONTRACTOR in such DELIVERABLE TECHNICAL INFORMATION.

(3) The Government agrees to include any copyright notice on any reproduction of the DELIVERABLE TECHNICAL INFORMATION made by the Government.

(h) [The following paragraph shall be used when the CONTRACTOR will receive TECHNICAL INFORMATION from the Government containing notices restricting the right of the Government or others to use or disclose such TECHNICAL INFORMATION.]

The CONTRACTOR agrees that to the extent it receives or is given access to any TECHNICAL INFORMATION necessary for the performance of this CONTRACT which is subject to a LIMITED RIGHTS or GOVERNMENT PURPOSE RIGHTS Notice, or contains other restrictive markings, the CONTRACTOR shall treat such TECHNICAL INFORMATION in accordance with such notices or markings.

(i) Omitted and nonconforming notices.

(1) DELIVERABLE TECHNICAL INFORMATION delivered without appropriate restrictive notices, or without a copyright notice, will be presumed to have been delivered with an UNLIMITED RIGHTS license, and the Government assumes no liability for the disclosure, use, or reproduction of such DELIVERABLE TECHNICAL INFORMATION. However, to the extent the DELIVERABLE TECHNICAL INFORMATION has not been disclosed, the CONTRACTOR may request, within 6 months [substitute (longer period if in accordance with agency procedures), permission of the Contracting Officer to have omitted notices placed on qualifying DELIVERABLE TECHNICAL INFORMATION, at the CONTRACTOR'S expense. The Contracting Officer shall approve this request if the CONTRACTOR --

(i) Identifies the DELIVERABLE TECHNICAL INFORMATION for which notice is to be added;

(ii) Establishes that the use of the notice is authorized; and

(iii) Acknowledges that the Government has no liability with respect to any disclosure or use of any such DELIVERABLE TECHNICAL INFORMATION made prior to the addition of the notice or resulting from the omission of the notice.

(2) DELIVERABLE TECHNICAL INFORMATION delivered with notices which appear to assert CONTRACTOR'S rights in such DELIVERABLE TECHNICAL INFORMATION but which notices do not conform to the notices listed in (b) and (c) above may be used, after notification of the CONTRACTOR by the Government as if the notices were conforming. The CONTRACTOR shall be required to correct the markings to conform to the CONTRACT. If the CONTRACTOR fails to correct the markings within 60 days after notice from the Contracting Officer, the Government may correct the markings at the CONTRACTOR'S expense.

(j) Unauthorized marking of DELIVERABLE TECHNICAL INFORMATION. Notwithstanding any other provisions of this CONTRACT concerning inspection or acceptance, if any DELIVERABLE TECHNICAL INFORMATION delivered under this CONTRACT is marked with notices specified in paragraph (b) or (c) of this clause that are not justified by this clause or by any other terms of this CONTRACT, the Contracting Officer may either return the DELIVERABLE TECHNICAL INFORMATION to the CONTRACTOR, or challenge the alleged restrictions in accordance with the procedures set forth in the Validation clause 52.227-24 of this CONTRACT.

(k) The Government shall not require the CONTRACTOR to grant greater rights in a subcontractor's DELIVERABLE TECHNICAL INFORMATION than set forth in 27.404(b)(5) without the express consent of the subcontractor.

(l) Relationship to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

52.227-21 Conformity of DELIVERABLE TECHNICAL INFORMATION

The CONTRACTOR shall provide the following assurance for DELIVERABLE TECHNICAL INFORMATION:

"Effective _____, the CONTRACTOR hereby assures, to its best knowledge and belief, that the DELIVERABLE TECHNICAL INFORMATION, identified in this CONTRACT No. _____ as being subject to this clause is complete and accurate and satisfies the requirements of such CONTRACT concerning DELIVERABLE TECHNICAL INFORMATION.

52.227-24 Validation of restrictive notices on DELIVERABLE TECHNICAL INFORMATION

Validation of Restrictive Notices on DELIVERABLE TECHNICAL INFORMATION (Statutory) (XXX 1990)

(a) The terms used in this clause are defined in the clause at 52.227-14, Rights in DELIVERABLE TECHNICAL INFORMATION.

(b) The CONTRACTOR at any tier shall furnish to the Contracting Officer written justification of the validity of any notices that impose restrictions on the Government or others to use, duplicate, or disclose DELIVERABLE TECHNICAL INFORMATION in response to a challenge under paragraph (c) of this clause.

(c) Notwithstanding any provision in this CONTRACT concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive notices is warranted, the Contracting Officer shall send a written challenge to the CONTRACTOR asserting such restriction, and such challenge shall --

(1) State the specific grounds for challenging the asserted restriction;

(2) Require a response within 60 days justifying the current validity of the asserted restriction;

(3) Request to be notified if the restriction has been validated within the past 3 years, or if another contractor is challenging the restriction, or challenges the restriction during the process of this challenge; and

(4) State that failure to respond to the challenge notice may result in a final decision of the Contracting Officer. The Contracting Officer shall extend the challenge period for an additional 90 days if the CONTRACTOR submits a written request for additional time. Subsequent requests for additional time to respond may be granted at the discretion of the Contracting Officer.

(d) Final decision when the CONTRACTOR fails to respond. Upon failure to respond within the challenge period, the Contracting Officer will issue a final decision pertaining to the validity of the restriction. The Contracting Officer will proceed with section (f) before disclosure of the DELIVERABLE TECHNICAL INFORMATION outside the Government.

(e) Final decision when the CONTRACTOR responds. If the Contracting Officer determines that the response has justified the validity of the restrictive notice, the Contracting Officer will issue a final decision to that effect. If the Contracting Officer determines that the validity of the restrictive notice is not justified, the Contracting Officer shall issue a decision to that effect. Final decisions shall be made within 60 days of the CONTRACTOR'S response, unless

the Contracting Officer determines that additional time is required, in which case the Contracting Officer shall notify the CONTRACTOR of such an additional time period within 60 days of the receipt of the response to the challenge notice.

(f) After the issuance of a final decision under either paragraph (d) or (e) of this clause, the Government will continue to be bound by the asserted restriction for a period of 90 days from the date of the Contracting Officer's final decision in order to permit the CONTRACTOR to avail itself of administrative or judicial review. If the decision is not appealed to a Board of Contract Appeals, or if notice of intent to appeal to the Claims Court is not provided to the Contracting Officer within the 90 days, the Government may cancel or ignore the restrictive notices and the failure of the CONTRACTOR to pursue appropriate remedies shall constitute consent to that action.

(g) If the decision of the Contracting Officer is properly appealed, the Government will continue to be bound by the asserted restriction until the appeal or suit is decided.

(End of clause)

52.227-26 Standard nondisclosure agreement.

As prescribed in 27.410(d), the Contracting Officer shall require execution of the following agreement when the Government discloses **DELIVERABLE TECHNICAL INFORMATION** in which the Government has received a **GOVERNMENT PURPOSE RIGHTS** license to a non-Government entity:

Standard Non-Disclosure Agreement (XXX 1991)

In recognition of the Government's obligation to protect certain proprietary information from unauthorized use or disclosure and the need of the undersigned party (hereinafter **RECIPIENT**) to receive such proprietary information, permit the **RECIPIENT** to compete for, perform, or to prepare to compete for, or perform Government contracts, **RECIPIENT** agrees as follows:

1. **OWNER PROPRIETARY INFORMATION** shall mean **TECHNICAL INFORMATION** received by the **RECIPIENT** under this agreement and bearing a notice restricting the use, disclosure, or duplication of the **TECHNICAL INFORMATION** by the Government or others.
2. **RECIPIENT** agrees that **OWNER PROPRIETARY INFORMATION** shall be used only for the purposes identified in such Government contract(s), provided that such use is authorized by the restrictive notice, and shall not be disclosed to others, except as permitted in paragraph 4 hereof, without the express written consent of the **CONTRACTOR** (hereinafter **OWNER**) whose name appears in the restrictive notice.
3. **RECIPIENT** agrees to provide written notice and a copy of this nondisclosure agreement to the **OWNER** whenever the **RECIPIENT** receives **OWNER PROPRIETARY INFORMATION**. The notice shall identify the **OWNER PROPRIETARY INFORMATION**, the date and place of its receipt, and the source from which the **OWNER PROPRIETARY INFORMATION** was received.
4. **RECIPIENT** may, if necessary for the performance of **RECIPIENT**'s obligations under the contract, disclose **OWNER PROPRIETARY INFORMATION** containing a **GOVERNMENT PURPOSE RIGHTS** notice to **RECIPIENT**'s subcontractors. Such disclosure shall not occur until the subcontractor has executed the Standard Non-Disclosure Agreement.
5. **RECIPIENT** agrees to adopt operating procedures and physical security measures designed to protect **OWNER PROPRIETARY INFORMATION** from inadvertent disclosure to unauthorized third parties.
6. **RECIPIENT** agrees that any **OWNER PROPRIETARY INFORMATION** is provided "as is" without any representation as to suitability or warranty whatsoever, and without any obligation on the part of the Government to make any additions or alterations thereto.
7. **RECIPIENT** agrees to indemnify and hold harmless the United States Government, its agents, and employees from every liability or claim arising out of, or in any way related to, the misuse or unauthorized disclosure by the **RECIPIENT** of any **OWNER PROPRIETARY INFORMATION**.

8. RECIPIENT agrees that execution of this non-disclosure agreement is for the benefit of the OWNER identified in the restrictive notice appearing on the OWNER PROPRIETARY INFORMATION. Such OWNER is a third party beneficiary of this agreement who shall have all available rights of direct action against the RECIPIENT to enforce this agreement or to seek damages which may result from any breach of this agreement.

9. RECIPIENT agrees that the Government may also seek any remedy available to enforce this agreement, including, but not limited to, application for a court order prohibiting misuse or unauthorized disclosure of information in breach of the agreement. RECIPIENT agrees to pay court costs and reasonable attorney's fees incurred by the Government in any such suit in which the Government substantially prevails.

10. Nothing in this agreement prohibits the RECIPIENT from entering into an agreement directly with the OWNER with respect to the use of the OWNER PROPRIETARY INFORMATION.

11. Nothing in this agreement shall restrict the right of RECIPIENT to use or disclose TECHNICAL INFORMATION which, without violation of this or any other agreement, is or becomes part of the public domain, or is received without restriction by RECIPIENT.

12. RECIPIENT shall return or destroy any OWNER PROPRIETARY INFORMATION, and certify same to the OWNER, when the Government contract for which the OWNER PROPRIETARY INFORMATION was received has been completed, awarded to another bidder, withdrawn, or at such time as the RECIPIENT no longer requires such OWNER PROPRIETARY INFORMATION to perform an outstanding duty under such Government contract.

13. The provisions of this Agreement shall be effective as long as the RECIPIENT retains the OWNER PROPRIETARY INFORMATION.

Date:

Company Name:

Authorized Signature:

Title:

(End of clause)

52.227-28 TECHNICAL INFORMATION to be delivered with agreed restrictive notices. The CONTRACTOR and the Government have agreed that the CONTRACTOR shall grant the Government the agreed rights in the following DELIVERABLE TECHNICAL INFORMATION. Restrictive notices contained in such DELIVERABLE TECHNICAL INFORMATION consistent with such agreed rights shall not be subject to challenge under the validation clause, 52.227 25.

[List DELIVERABLE TECHNICAL INFORMATION and specific rights agreed. (for example, LIMITED RIGHTS, SPECIFIC USE RIGHTS.)

(End of Clause)

52.227-101 Dissemination of DELIVERABLE TECHNICAL INFORMATION. Paragraph (a) shall be used in CONTRACTS which require the delivery of TECHNICAL INFORMATION in which the Government has received a license to use the DELIVERABLE TECHNICAL INFORMATION for manufacturing purposes.

(a) CONTRACTOR agrees to serve, under reasonable terms and conditions, as a repository for all DELIVERABLE TECHNICAL INFORMATION. Further, the CONTRACTOR agrees to provide to the Government timely access to any and all such DELIVERABLE TECHNICAL INFORMATION upon written request by the Government with the same license rights as are otherwise provided by the CONTRACT. Repository functions for DELIVERABLE TECHNICAL INFORMATION include maintenance, storage, retrieval and updating to conformance with the latest DELIVERABLE TECHNICAL INFORMATION currently in the possession of or use by the CONTRACTOR.

(End of Clause)

27.4TBDS-1 SPECIAL PROVISIONS - RIGHTS IN DELIVERABLE SOFTWARE

27.4TBDS-1 POLICY

It is the Government's policy to (1) encourage private investment in SOFTWARE-related technology; (2) promote commercialization of Government-funded SOFTWARE-related technologies; and (3) accept minimum rights in an originator's DELIVERABLE SOFTWARE.

(a) Rights in DELIVERABLE SOFTWARE. In consonance with the government's policy, ownership of SOFTWARE, any copyrights arising therein, and the scope of the license granted to the Government in DELIVERABLE SOFTWARE are controlled by the originator, unless otherwise prescribed by statute.

(b) Expanded RESTRICTED RIGHTS License.

(b)(1) Innovation may be encouraged by promoting effective competition between supplier's skills, products, capabilities, and price. The Contracting Officer shall assess alternative methods to the acquisition of an expanded RESTRICTED RIGHTS license in DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE and identify and use the least intrusive method of competition when competition is required. Competition shall be limited to the acquisition of maintenance and enhancements. Such competition shall be satisfied using the procedure set forth in 27.4TBDS 3(b)(3).

(b)(2) A CONTRACTOR (or a prospective CONTRACTOR) shall not be required, as a condition of being responsive to a solicitation or as a condition of the award of a CONTRACT to sell or otherwise relinquish rights in DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE.

27.4TBDS-2 Definitions

CONTRACT means, for the purposes of this subpart, the contract or subcontract with the entity who owns the DELIVERABLE TECHNICAL INFORMATION provided under this contract or subcontract.

CONTRACTOR means, for purposes of this subpart, the contractor or subcontractor who owns the DELIVERABLE TECHNICAL INFORMATION provided under this CONTRACT.

DOCUMENTATION means information recorded, using any means of recording or media, and including algorithms, processes, flow charts, formulae, manuals, specifications, and other materials pertaining to the SOFTWARE.

EXECUTABLE CODE means information recorded in any form using any means of recording or media, and consisting of a computer program comprising a series of computer readable instructions, rules, routines, or statements which allow or cause the computer to execute an operation or series of operations.

DELIVERABLE SOFTWARE means SOFTWARE required to be delivered to the Government under the CONTRACT.

GOVERNMENT PURPOSE SOFTWARE RIGHTS means the rights of the Government to use, duplicate, disclose, and prepare derivative works of DELIVERABLE SOFTWARE for Government purposes, and to perform publicly and display the output of the EXECUTABLE CODE publicly for Government purposes, but without the right to distribute copies to the public, and to authorize non-Governmental entities to exercise such rights when doing so will fulfill a legitimate Governmental purpose, provided that the Government makes any such non-Governmental entity subject to prohibition against further use and disclosure by that non-Governmental entity and requires the non-Governmental entity to notify the CONTRACTOR of such disclosure and use. To the extent such DELIVERABLE SOFTWARE is furnished without disclosure prohibitions to a third party or becomes publicly available, the foregoing disclosure prohibitions shall not apply.

ORIGINATED means that the SOFTWARE has been set down in a tangible medium of expression for the first time for the purpose of recording.

ORIGINATED AT PRIVATE EXPENSE in connection with DELIVERABLE SOFTWARE means that no part of the cost of origination of the DELIVERABLE SOFTWARE was charged as a direct charge to the Government, with the express understanding that independent research and development and bid and proposal costs, as defined in 31.205-18 (whether or not included in a formal independent research and development program), and costs allocated to overhead accounts in accordance with the Cost Accounting Standards (CAS) for those CONTRACTS covered by CAS, or in

accordance with generally accepted accounting principles for those CONTRACTS not covered by CAS, are not to be considered origination costs charged to the Government for purposes of this definition.

ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS in connection with **DELIVERABLE SOFTWARE** means that the full cost of origination of the **DELIVERABLE SOFTWARE** was paid for in whole by the Government. Independent research and development and bid and proposal costs, as defined in 31.205-18 (whether or not included in a formal independent research and development program), and costs allocated to overhead accounts in accordance with the Cost Accounting Standards (CAS) for those CONTRACTS covered by CAS, or in accordance with generally accepted accounting principles for those CONTRACTS not covered by CAS, are not to be considered origination costs charged to the Government for purposes of this definition.

ORIGINATED WITH MIXED FUNDS means the **DELIVERABLE SOFTWARE** is not capable of being separated at the lowest identifiable level into **DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS** or **DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE**.

RESTRICTED RIGHTS means the rights of the Government to:

- (1) use such **DELIVERABLE SOFTWARE** solely for the internal purposes of the Government with the computer for which or with which it was acquired, including use at any new location to which the computer may be transferred by the Government;
- (2) use such **DELIVERABLE SOFTWARE** in conjunction with other **SOFTWARE**;
- (3) combine or merge such **DELIVERABLE SOFTWARE** with other **SOFTWARE** subject to the provision that those portions of the derivative **SOFTWARE** incorporating such **DELIVERABLE SOFTWARE** are subject to the same rights, including copyright, specified in this clause;
- (4) use such **DELIVERABLE SOFTWARE** with a backup computer if the computer for which or with which it was acquired is inoperative until operation of such computer is restored;
- (5) reproduce; for the purposes of safekeeping (archives) or implementing reasonable backup procedures, up to three (3) copies of the **DELIVERABLE SOFTWARE** without the prior written consent of the originator, provided all copyright notices and **RESTRICTED RIGHTS** notices are reproduced;
- (6) use for a reasonable and limited period of time a preceding release of such **DELIVERABLE SOFTWARE** concurrent with installation and testing of a subsequent release, provided that all copies of the preceding release are destroyed at the conclusion of the installation and testing period;
- (7) use such **DELIVERABLE SOFTWARE** in accordance with the terms of this clause without disclosure prohibitions, if the **DELIVERABLE SOFTWARE** is publicly available or has been delivered by the **CONTRACTOR** to a third party without restriction as to further disclosure by such third party.
- (8) authorize Government support contractors to exercise the rights described in (1) through (7) for the sole purpose of providing support services to the Government and subject to the same restrictions binding the Government.

SOFTWARE means **EXECUTABLE CODE**, **USER MANUALS**, **SOURCE CODE LISTINGS**, and **DOCUMENTATION**.

SOURCE CODE LISTINGS means information recorded in any form using any means of recording or media, and consisting of human readable instructions, rules, routines, or statements which may be compiled to cause or allow a computer to execute an operation or series of operations.

UNLIMITED RIGHTS, in connection with **DELIVERABLE SOFTWARE**, means the rights of the Government to use, duplicate, and disclose **DELIVERABLE SOFTWARE**, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose and to have or permit others to do so.

USER MANUALS means information recorded, using any means of recording, in the form of manuals explaining the use and operational characteristics of the **EXECUTABLE CODE** delivered under the **CONTRACT**.

(a) **Public Domain SOFTWARE:** A CONTRACTOR may not impose any restriction on the Government to use, duplicate, disclose, distribute, display or make derivative works of DELIVERABLE SOFTWARE that is in the public domain.

(b) **Basic and Expanded Scope Licenses**

(b)(1) **DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS:**

(i) Except as provided in 27.4TBDS-3(b)(1)(ii), the Government may elect to be granted a GOVERNMENT PURPOSE SOFTWARE RIGHTS license or an UNLIMITED RIGHTS license in all DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS.

(ii) The Government shall not elect to receive an UNLIMITED RIGHTS license if the originator of the DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS requests that the Government elect to receive a GOVERNMENT PURPOSE SOFTWARE RIGHTS license. Such request shall include a positive statement of intent to use the DELIVERABLE SOFTWARE for a commercial purpose. The originator's request shall be granted unless the DELIVERABLE SOFTWARE must be distributed to the public by virtue of clear statutory requirements or the CONTRACT pertains to basic research undertaken for the stated purpose of public distribution. If the originator cannot demonstrate that it has made a positive attempt to use such DELIVERABLE SOFTWARE commercially within a negotiated period of time, which is in no case less than two (2) years, after CONTRACT completion date, the Government shall receive an UNLIMITED RIGHTS license in such uncommercialized DELIVERABLE SOFTWARE.

(b)(2) **DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE:** The Government shall be granted a RESTRICTED RIGHTS license in any DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE and minor modifications thereof. The originator shall normally only be required to deliver EXECUTABLE CODE and USER MANUALS for DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE.

(b)(3) **Negotiating for Greater than RESTRICTED RIGHTS license:** The Government shall not negotiate for a greater than RESTRICTED RIGHTS license in DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE if the originator can provide the Government with assurances that such DELIVERABLE SOFTWARE can be adequately enhanced or maintained by the originator or a responsible third party. If the originator cannot provide such assurances, the Government shall first attempt to negotiate alternate methods of meeting its enhancement or maintenance needs. Such alternate methods shall include, for example, conditional directed licensing, an escrow agreement, conditional licenses, or such other arrangement as may be developed in consultation with the originator. Only if the Government cannot meet its needs by means of such alternate methods shall the Government seek to negotiate a greater than RESTRICTED RIGHTS license in DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE.

(b)(4) **DELIVERABLE SOFTWARE ORIGINATED WITH MIXED FUNDS:** The Government and the CONTRACTOR shall negotiate the scope of the license in DELIVERABLE SOFTWARE ORIGINATED WITH MIXED FUNDS.

27.4TBDS-4 Marking of DELIVERABLE SOFTWARE

(a) **Restrictive Notices:** The originator of DELIVERABLE SOFTWARE may restrictively mark such DELIVERABLE SOFTWARE in accordance with the clause at 52.227-TBDS-1, Rights in DELIVERABLE SOFTWARE.

(b) **Omitted Restrictive Markings or Copyright Notices:** Any DELIVERABLE SOFTWARE delivered to the Government and not bearing a notice restricting disclosure or use by the Government shall be presumed to have been delivered without restriction on the Government's rights to disclose and use such DELIVERABLE SOFTWARE. However, to the extent such DELIVERABLE SOFTWARE has not been disclosed to non-Governmental entities, the originator may within six (6) months after delivery (or longer period in accordance with agency procedure), request permission of the Contracting Officer to have the omitted restrictive notices placed on qualifying DELIVERABLE SOFTWARE at the originator's sole expense. Such permission shall be granted if the originator:

(i) identifies the DELIVERABLE SOFTWARE;

(ii) establishes that the application of the restrictive notice is in accordance with the clause at 52.227-TBDS-1, Rights in DELIVERABLE SOFTWARE; and

(iii) acknowledges that the Government has no liability with respect to any disclosure to any non-Governmental entity made prior to the addition of or resulting from the omission of the restrictive notice.

(c) Nonconforming Notices: If the DELIVERABLE SOFTWARE in the possession of the Government appears to be SOFTWARE the originator is authorized to restrictively mark, but the notice(s) is nonconforming, then the Government may require the originator to correct the notices to conform to the CONTRACT. Nonconforming means any notice that is ambiguous or substantially inconsistent with the restrictive notice authorized under the clause at 52.227-TBDS-1, Rights in DELIVERABLE SOFTWARE. If the originator fails to correct the notices within 60 days after written notice from the Contracting Officer, the Government may correct the notice(s) at the originator's expense. Since interpretation of a nonconforming notice is discretionary, the originator should not assume that any nonconforming notice(s) is adequate to protect its rights.

27.4TBDS-5 Solicitation Provisions and CONTRACT Clauses

(a) The Contracting Officer shall insert the clause at 52.227-TBDS-1, Rights in DELIVERABLE SOFTWARE, and 52.227-TBDS-2, Validation of Restrictive Notices on DELIVERABLE SOFTWARE, if DELIVERABLE SOFTWARE is required under the CONTRACT,

(b) The Contracting Officer may at any time, enter into an agreement with an originator regarding restrictions on the rights Government to use, duplicate, or disclose DELIVERABLE SOFTWARE.

PART 52 -- SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.227-TBDS-1 Rights in DELIVERABLE SOFTWARE

(a) Definitions [See 27.4TBDS-2]

(b) Rights of the Government in DELIVERABLE SOFTWARE

(1) Public Domain SOFTWARE: There shall be no restriction on the Government's right to use, duplicate, disclose, distribute, display, or make derivatives of DELIVERABLE SOFTWARE to the extent such DELIVERABLE SOFTWARE is in the public domain.

(2) GOVERNMENT PURPOSE SOFTWARE RIGHTS License: The CONTRACTOR grants the Government a nonexclusive, fully paid-up GOVERNMENT PURPOSE SOFTWARE RIGHTS license in all DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS.

(3) RESTRICTED RIGHTS License: The CONTRACTOR grants the Government a nonexclusive, nontransferable, fully-paid up RESTRICTED RIGHTS license in all DELIVERABLE SOFTWARE ORIGINATED AT PRIVATE EXPENSE.

(4) Nonstandard Rights License: The CONTRACTOR grants the Government the following negotiated license in DELIVERABLE SOFTWARE, identified elsewhere in this CONTRACT, that was ORIGINATED WITH MIXED FUNDS.

(List license rights and other restrictions)

(5) Incorporation of Other SOFTWARE: When a CONTRACTOR incorporates into DELIVERABLE SOFTWARE modules or subroutines in which the CONTRACTOR does not own all intellectual property rights, the CONTRACTOR shall make a reasonable good faith effort to obtain for the Government at least a RESTRICTED RIGHTS license in such incorporated modules or subroutines. If the CONTRACTOR is not able to obtain a RESTRICTED RIGHTS LICENSE, the Contracting Officer's permission to incorporate such modules or subroutines must be obtained.

(6) Challenging Restrictive Legends: The Government may challenge inappropriate restrictive legends in accordance with the clause at 52.227-TBDS-2, Validation of Restrictive Markings on DELIVERABLE SOFTWARE.

(c) Rights of Contractors and Subcontractors:

(1) Ownership: The originator of DELIVERABLE SOFTWARE shall be considered the owner of all intellectual property rights in such DELIVERABLE SOFTWARE subject to (b)(1)-(7), above.

(2) Restrictive Notices: The originator of DELIVERABLE SOFTWARE may use appropriate restrictive notices with such DELIVERABLE SOFTWARE in accordance with this clause.

(3) Direct Delivery to the Government: Any lower tier subcontractor under this CONTRACT may furnish DELIVERABLE SOFTWARE directly to the Government rather than to the prime contractor unless such DELIVERABLE SOFTWARE is needed by the prime contractor for installation in the system that the prime contractor is required to deliver to the Government.

(4) No Leverage: Neither the prime contractor (nor any lower tier subcontractor) shall use its power to award subcontracts as a means of acquiring greater rights in DELIVERABLE SOFTWARE from its subcontractors than are granted the Government under this clause.

(5) Flowdown to Subcontractors: Whenever any DELIVERABLE SOFTWARE is to be obtained from a subcontractor under this CONTRACT, the CONTRACTOR (or lower tier subcontractor) shall, as appropriate use this same clause in the subcontract, without alteration. No other clause shall be used that will enlarge or diminish either the Government's or the CONTRACTOR'S rights in the subcontractor's DELIVERABLE SOFTWARE.

(d) Restrictive Notices

(1) No Marking if in Public Domain: DELIVERABLE SOFTWARE that is in the public domain shall be delivered by the CONTRACTOR without restrictive notices.

(2) Standard Restrictive Notice: DELIVERABLE SOFTWARE subject to a license are to be delivered to the Government with the following restrictive notice:

"NOTICE

The Government has been granted a [Here insert type of license granted, e.g. RESTRICTED RIGHTS, GOVERNMENT PURPOSE SOFTWARE RIGHTS, or Nonstandard Rights] license in this DELIVERABLE SOFTWARE by (original name) pursuant to (Contract or subcontract).

(End of Notice)

(3) Alternate Restrictive Notice: If the DELIVERABLE SOFTWARE is embedded, or it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (of the CONTRACT) in brackets or a box, as [R-8/90] may be used. This shall be read to mean that the government is granted a RESTRICTED RIGHTS license in the DELIVERABLE SOFTWARE as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event the CONTRACT contains any variation or modification to RESTRICTIVE RIGHTS as defined in this subpart, then the CONTRACT number must also be cited.

(4) Copyright Notice: The originator may include a copyright notice with DELIVERABLE SOFTWARE consistent with the copyright statute, Title 17, U.S. Code. For unpublished DELIVERABLE SOFTWARE, the originator may further include the term "Unpublished" and/or other appropriate notices.

(e) Disclosure Restrictions: Except for those rights in the DELIVERABLE SOFTWARE specifically granted within this clause, no rights in the DELIVERABLE SOFTWARE are granted to the Government. In the case of RESTRICTED RIGHTS DELIVERABLE SOFTWARE, the Government shall not have the right to reverse compile or reverse assemble the EXECUTABLE CODE or in any other way attempt to discover the SOURCE CODE LISTINGS for the DELIVERABLE SOFTWARE. The SOURCE CODE LISTINGS and DOCUMENTATION is a trade secret of the CONTRACTOR or, in some cases, its subcontractors. In the event the SOURCE CODE LISTINGS and DOCUMENTATION becomes known to the Government in any manner, the Government shall preserve such SOURCE CODE LISTINGS or DOCUMENTATION in confidence and shall not disclose such SOURCE CODE LISTINGS or DOCUMENTATION to any third parties including, but not limited, prime contractors, subcontractors, and agents of the Government. This provision does not limit the right of the Government to use DELIVERABLE SOFTWARE or information therein, which the Government may already have or obtains without restriction.

(f) [optional] The CONTRACTOR grants to the Government an UNLIMITED RIGHTS license in DELIVERABLE SOFTWARE ORIGINATED EXCLUSIVELY WITH GOVERNMENT FUNDS and in which the contractor has not notified the Government of its intent to commercialize.

End of Clause

52.227-TBDS-2 Validation of Restrictive Markings on DELIVERABLE SOFTWARE

Validation of Restrictive Notices on DELIVERABLE SOFTWARE (XXX-1990)

- (a) The terms used in this clause are defined in the clause at 52.227- TBDS-1, Rights in DELIVERABLE SOFTWARE.
- (b) The CONTRACTOR at any tier shall furnish to the Contracting Officer written justification of the validity of any notices that impose restrictions on the Government or others to use, duplicate, or disclose DELIVERABLE SOFTWARE in response to a challenge under paragraph (c) of this clause.
- (c) Notwithstanding any provision in this CONTRACT concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive notices is warranted, the Contracting Officer shall send a written challenge to the CONTRACTOR asserting such restriction, and such challenge shall --
- (1) State the specific grounds for challenging the asserted restriction;
 - (2) Require a response within 60 days justifying the current validity of the asserted restriction unless an extension of time is granted;
 - (3) Request to be notified if the restriction has been validated within the past 3 years, or if another Contracting Officer is challenging the restriction, or challenges the restriction during the process of this challenge; and
 - (4) State that failure to respond to the challenge notice may result in a final decision of the Contracting Officer. The Contracting Officer shall extend the challenge period for an additional 90 days if the CONTRACTOR submits a written request for additional time. Subsequent requests for additional time to respond may be granted at the discretion of the Contracting Officer.
- (d) Final decision when the CONTRACTOR fails to respond. Upon failure to respond within the challenge period, the Contracting Officer will issue a final decision pertaining to the validity of the restriction. The Contracting Officer will proceed with section (f) before disclosure of the DELIVERABLE SOFTWARE outside the Government.
- (e) Final decision when the CONTRACTOR responds. If the Contracting Officer determines that the response has justified the validity of the restrictive notice, the Contracting Officer will issue a final decision to that effect. If the Contracting Officer determines that the validity of the restrictive notice is not justified, the Contracting Officer shall issue a decision to that effect. Final decisions shall be made within 60 days of the CONTRACTOR'S response, unless the Contracting Officer determines that additional time is required, in which case the Contracting Officer shall notify the CONTRACTOR of such an additional time period within 60 days of the receipt of the response to the challenge notice.
- (f) After the issuance of a final decision under either paragraph (d) or (e) of this clause, the Government will continue to be bound by the asserted restriction for a period of 90 days from the date of the Contracting Officer's final decision in order to permit the CONTRACTOR to avail itself of administrative or judicial review. If the decision is not appealed to a Board of Contract Appeals, or if notice of intent to appeal to the Claims Court is not provided to the Contracting Officer within the 90 days, the Government may cancel or ignore the restrictive notices and the failure of the CONTRACTOR to pursue appropriate remedies shall constitute consent to that action.
- (g) If the decision of the Contracting Officer is properly appealed, the Government will continue to be bound by the asserted restriction until the appeal or suit is decided.

(End of clause)

52.227-TBDS-3 Sample Conditional Escrow Agreement TBD

52.227-TBDS-4 Sample Conditional Directed Licensing Clause TBD

52.227-TBDS-5 Sample Conditional License TBD

27.4TBDC SPECIAL PROVISIONS - COMMERCIAL PRODUCTS

27.4TBDC-1 Acquisition of COMMERCIAL PRODUCTS -Policy

(a) It is the Government's policy to make use of COMMERCIAL PRODUCTS, to the extent feasible, for defense, space, and other Government applications. Government CONTRACTORS may also use this subpart when acquiring COMMERCIAL PRODUCTS for use in the performance of a Government CONTRACT.

(b) In any CONTRACT for a COMMERCIAL PRODUCT, the Contracting Officer shall not establish any flowdown requirement that would disrupt any preexisting contractual relationship between the CONTRACTOR and its subcontractors.

27.4TBDC-2 "Definitions

COMMERCIAL ITEMS means any product, system, subsystem, component, material, or service which: (1) has been sold or traded to the general public; (2) has been offered for sale to the general public at prices established by the CONTRACTOR but not yet sold; (3) has not yet been offered for sale or trade to the general public but will be available for commercial delivery in a reasonable period of time; or (4) is a COMMERCIAL MODIFICATION of such product, system, subsystem, component, material or service.

COMMERCIAL MODIFICATION means any modification which must be made to a COMMERCIAL PRODUCT during the performance of the CONTRACT to meet the requirements of the procuring agency and: (a) is of the type customarily provided in the commercial marketplace; (b) does not significantly alter the inherent function, performance, physical characteristics, or purpose of the COMMERCIAL PRODUCT; or (c) is the result of the use of any TECHNICAL INFORMATION or know-how in the possession of the CONTRACTOR that is or may be used by the CONTRACTOR to design or manufacture its COMMERCIAL PRODUCTS.

COMMERCIAL PRODUCT means COMMERCIAL ITEMS and/or COMMERCIAL SOFTWARE.

COMMERCIAL SOFTWARE means any SOFTWARE acquired as an end item or stored in any product, system, subsystem, component, material or service and which: (1) has been sold or traded to the general public; (2) has been offered for sale to the general public at prices established by the CONTRACTOR but not yet sold; (3) has not yet been offered for sale or trade to the general public but will be available for commercial delivery in a reasonable period of time; or (4) is a COMMERCIAL MODIFICATION of such SOFTWARE.

COMMERCIAL SOFTWARE RESTRICTED RIGHTS means the rights of the Government to : (1) use EXECUTABLE CODE and USERS MANUALS, solely for the internal purposes of the Government, on only one computer at any one time, including use at any new location to which the computer may be transferred by the Government; (2) make a copy of the EXECUTABLE CODE and USERS MANUALS for backup purposes, provided any copyright notices and/or COMMERCIAL SOFTWARE RESTRICTED RIGHTS legends are reproduced; (3) combine and/or merge such EXECUTABLE CODE into other SOFTWARE subject to the provision that those portions of the derivative EXECUTABLE CODE are subject to the same rights, including copyright, specified in this clause; and (4) authorize Government support contractors to exercise the rights described in (1) through (3) subject to the same restrictions binding the Government. Except for those rights in the DELIVERABLE COMMERCIAL SOFTWARE specifically granted within this clause, no rights in the DELIVERABLE COMMERCIAL SOFTWARE are granted to the Government. Neither the Government nor any Government support contractor shall have the right to reverse compile or reverse assemble the EXECUTABLE CODE into a SOURCE CODE LISTINGS, or in any other way attempt to discover the SOURCE CODE LISTINGS or DOCUMENTATION for the COMMERCIAL SOFTWARE. COMMERCIAL SOFTWARE embody trade secrets, commercial, financial, or privileged information of the CONTRACTOR. In the event the SOURCE CODE LISTINGS or DOCUMENTATION becomes known to the Government, or any of its support contractors in any manner, the Government and such contractors shall preserve such SOURCE CODE LISTINGS and DOCUMENTATION in confidence and shall not disclose such SOURCE CODE LISTINGS and DOCUMENTATION to any third party. This provision does not limit the right of the Government to use SOFTWARE or information therein, which the Government may already have or obtains without restriction.

CONTRACT means, for the purposes of this subpart, the contract or subcontract with the entity who owns the DELIVERABLE TECHNICAL INFORMATION provided under this contract or subcontract.

CONTRACTOR means, for purposes of this subpart, the CONTRACTOR or subcontractor who owns the DELIVERABLE TECHNICAL INFORMATION provided under this CONTRACT.

CUSTOMARY INFORMATION means the type of **TECHNICAL INFORMATION** pertaining to the **COMMERCIAL ITEM** ordinarily furnished to the general public as part of the **COMMERCIAL ITEM'S** price or which, at the discretion of the **CONTRACTOR**, may be made available to a commercial customer for purchase or under license.

CUSTOMARY LICENSE RIGHTS means the license rights in **CUSTOMARY INFORMATION** as are normally granted a member of the general public purchasing the **COMMERCIAL PRODUCT**.

CUSTOMARY SOFTWARE means **COMMERCIAL SOFTWARE** ordinarily furnished to the general public as part of the license fee for the **COMMERCIAL SOFTWARE** or which may, at the discretion of the **CONTRACTOR**, be made available to a commercial customer for purchase or under license.

DELIVERABLE means **TECHNICAL INFORMATION OR SOFTWARE** identified as being required to be delivered to the Government under the **CONTRACT**.

DOCUMENTATION means information recorded, using any means of recording or media, and in the form of algorithms, processes, flow charts, formulae, and related materials that would enable the **SOURCE CODE LISTINGS** to be reproduced or created.

EXECUTABLE CODE means information recorded, using any means of recording or media, and in the form of a computer program comprising a series of computer readable instructions, rules, routines, or statements which allow or cause the computer to execute an operation or series of operations.

GOVERNMENT PURPOSE RIGHTS means the right of the Government to: use, duplicate, and disclose **DELIVERABLE TECHNICAL INFORMATION**, by or on behalf of the Government, including disclosure to a non-Government entity for any Government purpose, provided the Government makes such disclosure to such non-Government entity subject to prohibition against further use and disclosure by that entity and the Government or the non-Government entity notifies the **CONTRACTOR** of the use or disclosure.

GOVERNMENT PURPOSE SOFTWARE RIGHTS means the rights of the Government to use, duplicate, disclose and prepare derivative works of **DELIVERABLE SOFTWARE** and perform publicly and display the output of the **EXECUTABLE CODE** publicly, for Governmental purposes, and to authorize non-Governmental entities to exercise such rights when doing so will fulfill a legitimate Governmental function, provided the Government make such disclosure to any such non-Governmental entity subject to prohibition against further use and disclosure by that entity and requires the non-Governmental entity to notify the **CONTRACTOR** of such disclosure and use.

GOVERNMENT-UNIQUE MODIFICATION means any modification, other than a **COMMERCIAL MODIFICATION**, which: (1) is identifiable; (2) must be made to a **COMMERCIAL PRODUCT** as an element of performance under the **CONTRACT** to meet the requirements of the procuring agency; and (3) is the result of the use of **TECHNICAL INFORMATION** first produced in the performance of the **CONTRACT**.

MINIMUM INFORMATION means **TECHNICAL INFORMATION** providing instructions or training as to the capabilities of, proper installation, handling, or operation and proper maintenance and repair of the **COMMERCIAL ITEM** and **TECHNICAL INFORMATION** depicting any **COMMERCIAL MODIFICATION** or **GOVERNMENT-UNIQUE MODIFICATION**.

MINIMUM LIMITED RIGHTS means the rights of the Government to internally use and disclose **DELIVERABLE TECHNICAL INFORMATION** for the purposes of operation, proper installation, handling, and training with respect to the **COMMERCIAL ITEM** acquired by or on behalf of the Government provided the Government preserves and protect such **TECHNICAL INFORMATION** against use by and disclosure to any non-Governmental entity.

MINIMUM SOFTWARE means **EXECUTABLE CODE**, **USERS MANUALS**, and **SOFTWARE** documenting any **COMMERCIAL MODIFICATION** or **GOVERNMENT-UNIQUE MODIFICATION**.

SOFTWARE means **EXECUTABLE CODE**, **USERS MANUALS**, **SOURCE CODE LISTINGS**, and **DOCUMENTATION**.

SOURCE CODE LISTINGS means information recorded, using any means of recording, and in the form of human readable instructions, rules, routines, or statements which may be compiled to cause or allow a computer to execute an operation or series of operations.

TECHNICAL INFORMATION means information of an engineering or scientific nature, recorded in any form, on any media, or using any method of recording. The term does not include **SOFTWARE**.

USER MANUALS means information recorded, using any means of recording, in the form of manuals explaining the use and operational characteristics of the **EXECUTABLE CODE** delivered under the **CONTRACT**.

27.4TBDC-3 Acquisition of COMMERCIAL PRODUCTS INFORMATION -Procedure

(a) General. The Contracting Officer shall only require the delivery of **MINIMUM INFORMATION** or **MINIMUM SOFTWARE** when acquiring **COMMERCIAL ITEMS** or **COMMERCIAL SOFTWARE**, respectively. The **CONTRACTOR** may be requested to redraft or reformat **DELIVERABLE CUSTOMARY INFORMATION** or **DELIVERABLE CUSTOMARY SOFTWARE** to facilitate the Government's use of the **COMMERCIAL ITEM** or **COMMERCIAL SOFTWARE**. However, the Contracting Officer must document a need for requiring such redrafting or reformatting.

(b) Additional **DELIVERABLE TECHNICAL INFORMATION**. If the substance of the **CUSTOMARY INFORMATION** of the **CONTRACTOR** is not substantially equivalent to **MINIMUM INFORMATION**, the Contracting Officer, having documented a need therefor, may request the **CONTRACTOR** to generate and deliver and provide additional **DELIVERABLE TECHNICAL INFORMATION** satisfying the **MINIMUM INFORMATION** requirements of the procuring agency.

(c) Additional **DELIVERABLE SOFTWARE**. If the substance or functionality of the **CUSTOMARY SOFTWARE** of the **CONTRACTOR** is not substantially equivalent to **MINIMUM SOFTWARE**, the Contracting Officer, having documented a need therefor, may request the **CONTRACTOR** to generate and provide additional **SOFTWARE** satisfying the **MINIMUM DELIVERABLE SOFTWARE** requirements of the procuring agency.

(d) Financial Information. Any agreed-upon requirement for the reformatting or redrafting of the **CUSTOMARY INFORMATION** or **CUSTOMARY SOFTWARE** in accordance with 27.4TBDC-3(a), or the delivery of additional **DELIVERABLE TECHNICAL INFORMATION** in accordance with 27.4TBDC-3(b), or additional **DELIVERABLE SOFTWARE** in accordance with 27.4TBDC-3(c) shall be set forth in the **CONTRACT** as a separately priced line item. The Contracting Officer shall perform a price analysis in accordance with FAR 15.805-2 In lieu of requiring cost and pricing data from the **CONTRACTOR**.

27.4TBDC-4 License Rights In CUSTOMARY INFORMATION, COMMERCIAL SOFTWARE, Additional DELIVERABLE TECHNICAL INFORMATION, and Additional DELIVERABLE SOFTWARE.

(a) The Government shall be granted **MINIMUM LIMITED RIGHTS** in **DELIVERABLE CUSTOMARY INFORMATION** or **COMMERCIAL SOFTWARE RESTRICTED RIGHTS** in **CUSTOMARY SOFTWARE**, when acquired as an end item. Unless previously authorized in writing by the **CONTRACTOR**, the **CUSTOMARY INFORMATION** shall not be used by or on behalf of the Government for any design or manufacturing purpose or, in the case of **COMMERCIAL SOFTWARE**, for preparing the same or similar **SOFTWARE** or making derivative works of such **SOFTWARE**. The Contracting Officer shall not require a **CONTRACTOR** to grant the Government or subcontractor procurement rights in any such **CUSTOMARY INFORMATION** or **COMMERCIAL SOFTWARE**.

(b) **CONTRACTS** acquiring **COMMERCIAL ITEMS** shall use the license provisions set forth in 52.227-TBDC-1, Rights in **DELIVERABLE TECHNICAL INFORMATION**. When acquiring **COMMERCIAL SOFTWARE**, the clause at 52.227-TBDC-2, Rights in **DELIVERABLE COMMERCIAL SOFTWARE** shall be used. No other clause pertaining to rights in **TECHNICAL INFORMATION** or **SOFTWARE** shall be required to be included in any **CONTRACT** for such **COMMERCIAL ITEMS** or **COMMERCIAL SOFTWARE**.

(c) If the **CONTRACTOR** agrees to deliver additional **TECHNICAL INFORMATION** or additional **SOFTWARE** described in 27.4TBDC-3(b) or (c), an appropriate license, set forth in 52.227-TBDC-2 or -3, Alternate I, including reasonable terms and conditions negotiated by the parties, shall be included in the **CONTRACT**.

(d) Notwithstanding any of the above, if any **DELIVERABLE TECHNICAL INFORMATION** depicts or **SOFTWARE** documents a **GOVERNMENT UNIQUE MODIFICATION** to the **COMMERCIAL ITEM** or **COMMERCIAL SOFTWARE**, the license granted in such **DELIVERABLE TECHNICAL INFORMATION** and **SOFTWARE** shall be a **GOVERNMENT PURPOSE RIGHTS** license and a **GOVERNMENT PURPOSE SOFTWARE RIGHTS** license, respectively.

PART 52 - COMMERCIAL PRODUCTS CONTRACT CLAUSES

52.227-TBDC-1 Rights in DELIVERABLE TECHNICAL INFORMATION Pertaining to COMMERCIAL ITEMS. (XXX 1991)

(a) Definitions. [See 27.4TBDC-1]

(b) License rights acquired by the Government.

(1) **MINIMUM LIMITED RIGHTS License.** Unless otherwise agreed to by the parties, the Government shall be granted an irrevocable, nonexclusive world-wide, paid-up **MINIMUM LIMITED RIGHTS** license in all **DELIVERABLE CUSTOMARY INFORMATION**.

(2) **GOVERNMENT PURPOSE RIGHTS License.** The Government shall be granted an irrevocable, nonexclusive, world-wide, paid-up **GOVERNMENT PURPOSE RIGHTS** license in **DELIVERABLE TECHNICAL INFORMATION** depicting a **GOVERNMENT-UNIQUE MODIFICATION**.

(3) Reserved

(4) **Exceptions.** This clause shall not restrict disclosure or use of **DELIVERABLE TECHNICAL INFORMATION** that the Government can demonstrate by written or tangible evidence is:

(i) In the possession of the Government and was received without restriction as to further disclosure; or

(ii) In the public domain when received, or thereafter enters the public domain through no fault of the Government.

Specific aspects or details of **DELIVERABLE TECHNICAL INFORMATION** shall not be deemed to be within the foregoing exceptions merely because the **TECHNICAL INFORMATION** is embraced by general disclosures in the public domain or in the possession of the Government. In addition, any combination of features shall not be deemed to be within the foregoing exceptions merely because the individual features are in the public domain or in the possession of the Government unless the combination and its principle of operation are in the public domain or in the possession of the Government.

(c) **Relationship to patents.** Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right granted to the Government.

(d)(1) **Marking.** The **CONTRACTOR** shall mark all **DELIVERABLE TECHNICAL INFORMATION** with a legend that is consistent with the provisions of this clause.

(d)(2) If any **DELIVERABLE TECHNICAL INFORMATION** is delivered to the Government in digital form, an authorized user shall be given notice of the restrictions, if any, imposed upon users of the **DELIVERABLE TECHNICAL INFORMATION**.

(e) Except for the rights in **DELIVERABLE TECHNICAL INFORMATION** specifically granted within this clause, no rights in the **DELIVERABLE TECHNICAL INFORMATION** are granted to the Government.

(End of Clause)

Alternate I (XXX 1991)

As prescribed by 27.4TBDC-4(c), the Contracting Officer may insert the following Alternate I if additional **TECHNICAL INFORMATION** is to be delivered:

(b)(3) **Additional DELIVERABLE TECHNICAL INFORMATION.** The parties have agreed that the Government shall be granted the following license in additional **DELIVERABLE TECHNICAL INFORMATION**:

[LIST TERMS AND CONDITIONS]

52.227-TBDC-2. Rights in DELIVERABLE COMMERCIAL SOFTWARE (XXX 1991)

(a) Definitions, [See 27.4TBDC-1]

(b) License Rights Acquired by the Government.

(1) **COMMERCIAL SOFTWARE RESTRICTED RIGHTS.** Unless otherwise agreed to by the parties, the Government shall be granted an irrevocable, nonexclusive, world-wide, paid-up **COMMERCIAL SOFTWARE RESTRICTED RIGHTS** license in **DELIVERABLE CUSTOMARY SOFTWARE**.

(2) **GOVERNMENT PURPOSE SOFTWARE RIGHTS.** The Government shall be granted an irrevocable, nonexclusive, world-wide, paid-up **GOVERNMENT PURPOSE SOFTWARE RIGHTS** license in any **DELIVERABLE SOFTWARE** documenting a **GOVERNMENT-UNIQUE MODIFICATION**.

(3) Reserved.

(4) **Exceptions.** This clause shall not restrict disclosure or use of **DELIVERABLE SOFTWARE** that the Government can demonstrate by written or tangible evidence is:

(i) In the possession of the Government and was received without restriction as to further disclosure; or

(ii) In the public domain when received, or thereafter enters the public domain through no fault of the Government.

Specific aspects or details of **DELIVERABLE SOFTWARE** shall not be deemed to be within the foregoing exceptions merely because the **SOFTWARE** is embraced by general disclosures in the public domain or in the possession of the Government. In addition, any combination of features shall not be deemed to be within the foregoing exceptions merely because the individual features are in the public domain or in the possession of the Government unless the combination and its principle of operation are in the public domain or in the possession of the Government.

(c) **Relationship to patents.** Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right granted to the Government.

(d)(1) **Marking.** The **CONTRACTOR** shall mark all **DELIVERABLE SOFTWARE** with a legend that is consistent with the provisions of this clause.

(d)(2) **Simplified Marking.** TBD

(e) Except for the rights in **DELIVERABLE SOFTWARE** specifically granted within this clause, no rights in such **SOFTWARE** are granted to the Government.

(End of Clause)

Alternate I (XXX 1991). As prescribed by 27.4TBDC-4(c), the Contracting Officer may use the following Alternate I if additional **SOFTWARE** is to be delivered.

(b)(3) The parties have agreed the Government shall be granted the following license in additional **DELIVERABLE SOFTWARE**.

[LIST TERMS AND CONDITIONS]